91-1072

No. _____

In the
SUPREME COURT OF THE UNITED STATES
October Term, 1991

State of Utah, ***Petitioner,***

v.

Carlos Reinaldo Sampson, ***Respondent.***

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE STATE OF UTAH

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. What effect should the administration of a polygraph examination have on the issue of custody for Miranda purposes?

2. What effect should be given an ambiguous reference to counsel in response to Miranda warnings given to a person not in custody?

3. What effect should be given to an ambiguous reference to counsel in response to Miranda warnings generally?

4. Should derivative physical evidence obtained from an alleged violation of Miranda be admissible?

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CASES CITED

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In the
SUPREME COURT OF THE UNITED STATES
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State of Utah, *Petitioner,*

v.

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Petitioner State of Utah petitions this Court for a writ of certiorari to review the published decisions of a panel of the Utah Court of Appeals, which reversed the conviction of respondent on the ground that incriminating statements were obtained from him in violation of his Miranda[1] right to counsel.

OPINIONS BELOW

The published opinions of the Utah Court of Appeals are reported as State v. Sampson, 808 P.2d 1100 (Utah App. 1990); State v. Sampson, 156 Utah Adv. Rep. 4 (Utah App. March 15, 1991) (opinion on rehearing), cert.

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[1] Miranda v. Arizona, 384 U.S. 436 (1966).

denied, 817 P.2d 327 (Utah 1991). Copies of these opinions are reproduced as Appendices to this Petition.

JURISDICTION

In a motion to suppress filed in the trial court, respondent claimed that his fifth amendment right to counsel was violated when officers questioned him without a valid waiver of his rights under Miranda; the trial court rejected that claim. Respondent was convicted after and jury trial and pursued a direct appeal. The original opinion of the Utah Court of Appeals reversing the conviction was filed on September 11, 1991, and the opinion on rehearing was filed on March 15, 1991. The Utah Supreme Court denied petitioner's petition for a writ of certiorari on August 23, 1991.

Petitioner State of Utah now invokes the jurisdiction of this Court under 28 U.S.C. § 1257(3) because the state appellate courts have upheld respondent's claim that his right to counsel under the federal constitution has been violated.

CONSTITUTIONAL PROVISION

The Fifth Amendment to the United States Constitution provides, in pertinent part:

> No person shall . . . be compelled in any criminal case to be a witness against himself[.]

STATEMENT OF THE CASE

On November 24, 1986, at approximately 10:30 p.m., respondent entered a convenience store in Salt Lake County, Utah, and told the clerks that his nineteen-month-old daughter, Miyako Sampson, had been kidnapped. At his request, the clerks telephoned the police.

When deputies from the Salt Lake County Sheriff's Office responded, respondent told them that his daughter had been taken from his truck. Using a description and photograph of the child given them by respondent, the officers searched the area and investigated the alleged kidnapping until 4:00 a.m. At some point in the evening, respondent was informed that the officers were suspicious of his kidnapping claim; however, respondent was never in custody during the night. When the officers asked respondent to go to police headquarters the next morning for a polygraph examination, he agreed to do so.

At approximately 10:30 a.m. on November 25, respondent arrived at police headquarters and was met by the polygraph examiner, Sergeant Elliot. Respondent was taken to a small interrogation room, hooked up to the polygraph machine, and instructed about how the machine worked. Sgt. Elliot explained that the purpose of the test was to show whether respondent was truthful about the kidnapping report. Sgt. Elliot gave respondent the Miranda warnings after stating: "Because you are in the cop shop there is no doubt in your mind that this is the police station and, uh, because you are in taking a polygraph from a law enforcement agency I must advise you of your rights[.]" Sampson, Appendix A at p. 3. After the Miranda warnings were read, the following exchange occurred:

> Elliot: Okay, having these rights in mind[,] do you wish to talk to me now[?]
>
> Sampson: Well, uh, should I have a lawyer, I mean, well, I'm really not worried about anything, it is just that . . . .
>
> Elliot: Okay, if you are not worried about anything[,] I would say that is fine, let's go ahead and proceed. Let's get this thing done and get it over with and see what we can do.
>
> Sampson: I'm willing to get it over with.

Sampson, Appendix A at pp. 3-4. Respondent then read and signed a form listing his Miranda rights and indicating his willingness to take the polygraph test.

During the polygraph examination, Sgt. Elliot asked respondent whether he had arranged or caused the disappearance or death of his child, and whether he knew where she was hidden. Respondent answered in the negative each time. To the question of whether he knew where the child was hidden, the machine indicated a deceitful response. When Sgt. Elliot asked why the response appeared deceitful, respondent said he thought maybe the child's mother had done something to her.

Sgt. Elliot left respondent and sought out then Salt Lake County Sheriff Pete Hayward and told him about the results. Sheriff Hayward returned to the polygraph room and told respondent that there were inconsistencies in his story and that the sheriff did not believe respondent was telling the truth. The sheriff asked respondent if he had injured the child. After a short exchange, respondent asked for a cigarette. The sheriff stepped into another room and

obtained a cigarette and gave it to respondent. The sheriff again asked if respondent had injured his child. There was a pause of about five minutes, then respondent stood up, placed his hand on Hayward's shoulder, and said that his child was dead. When Hayward asked respondent to show them where the body was, respondent traveled with the sheriff and another officer, Lieutenant Forbes, to a town about thirty miles away in order to retrieve the body.

No questions were asked of respondent during the drive; however, respondent spontaneously offered that he thought that the child had died of a respiratory disease. When respondent asked, during the drive, what was going to happen next, Lieutenant Forbes answered that there would be an autopsy to establish the cause of death.

In American Fork, Utah, respondent directed the officers to a garbage dumpster and showed them a plastic garbage bag which contained the body of Miyako Sampson. While retrieving the body, an officer noticed bruises on the child's face. After the body was recovered, respondent was placed under arrest.

When respondent was returned to police headquarters in Salt Lake City, he was advised of his rights under Miranda and waived them without hesitation. At that point, respondent indicated that he did not believe or know that he was under arrest; he was informed a second time that he was under arrest. During the questioning, respondent said that he had spanked the child to punish her and that he had spanked her too hard. He refused to say that he had killed her; however, he said that he knew that something he had done had caused her death because she had stopped breathing after he hit her. The autopsy demonstrated that the child had died of multiple injuries, including severe trauma to her internal organs indicative of "a large amount of force" being applied externally. There

was also an asphyxial component to her death which, coupled with bruises along her jaw line, may have been indicative of the child's mouth and nose having been covered to smother cries of pain.

Respondent was charged with homicide. During the course of the proceedings, he filed a motion in the trial court to suppress his statements made to the police, claiming that he had invoked his right to counsel under Miranda. After a hearing, that motion was denied on August 28, 1987. Sampson, pleadings file at 169-91. After his was convicted after a jury trial, respondent challenged the denial of his suppression motion on direct appeal to the Utah Court of Appeals. On appeal, petitioner (the State) argued that respondent had not been in custody until after the body was found and respondent was placed under arrest; consequently, Miranda did not apply. The Utah Court of Appeals expressly declined to determine whether respondent was in custody; however, the court's analysis implies either that respondent was in custody from the moment he entered to take the polygraph test, or that an ambiguous request for counsel in response to gratuitous Miranda warnings had to be honored even if respondent was not in custody. The court held that respondent's statement, "Well, uh, should I have a lawyer, I mean, well, I'm really not worried about anything, it is just that . . . .", was an equivocal reference to counsel. The court then held that an equivocal reference to counsel requires that further questioning be limited to clarifying that reference. Sampson, Appendix A at pp. 20-24. Because Sgt. Elliot and Sheriff Hayward had not asked clarifying questions, the court found a violation of Miranda and reversed the conviction.

Petitioner sought rehearing of the court's decision. Without conceding that the interrogation was custodial or

that the initial reference to counsel even rose to the level of being an equivocal invocation of a right to counsel, petitioner argued that respondent's waiver of counsel after the second set of Miranda warnings given after the body was recovered served as a valid waiver. Respondent's incriminating statements came after this waiver.

The Utah Court of Appeals rejected this argument in a published opinion on rehearing. Sampson, Appendix B. Petitioner filed a petition for writ of certiorari in the Utah Supreme Court; however, that petition was denied. State v. Sampson, 817 P.2d 327 (Utah 1991).

REASONS FOR GRANTING THE WRIT

In reversing respondent's conviction, the Utah Court of Appeals has ignored and misconstrued case law from this Court and revealed conflicts in jurisdictions in four areas: 1) the effect of a polygraph examination on the issue of custody for Miranda purposes; 2) the effect to be given an ambiguous reference to a right to counsel after gratuitous Miranda warnings; 3) the effect to be given an ambiguous reference to counsel in response to Miranda warnings generally; and 4) the use of "derivative evidence" obtained from an alleged violation of Miranda. These issues have not been decided by this Court; consequently, the impact of the Miranda decision has been left open to a variety of interpretations by jurisdictions throughout this country. The Court should grant certiorari to resolve these conflicts.

I.

This Court Should Resolve the Conflict in Authority on the Issue of Whether a Polygraph Examination Converts a Non-Custodial Setting into a Custodial One Requiring a Miranda Waiver.

In a footnote to its original decision in this matter, the Utah Court of Appeals said, "In view of the result we reach, we need not decide in this case whether the polygraph examination as such was accusatory interrogation and whether defendant was in custody from the inception of the exam." Sampson, Appendix A at p. 14 n.10. The court also stated, "We need not decide whether defendant was in custody from the inception of the polygraph examination because no confession was elicited until after the exam was completed and the sheriff summoned." Sampson, Appendix A at pp. 16-17 (footnote omitted). After making these statements, however, the court treated a reference to counsel made by respondent at the inception of the examination as an equivocal invocation of the right to counsel. It then held that the officers were precluded at that point from asking any questions other than those intended to clarify respondent's reference to counsel. In analyzing the issue in this fashion, the court must have either implicitly concluded that respondent was in custody for purposes of Miranda from the beginning of the polygraph, or implicitly concluded that the police must honor an equivocal invocation of a right to counsel in response to gratuitous Miranda warnings. This section of the petition will address the issue of custody during a polygraph examination; the next section will address the

effect to be given an invocation of a right to counsel in response to gratuitous Miranda warnings.

The fifth amendment itself does not mention a right to counsel; however, this Court, in Miranda v. Arizona, 384 U.S. 436 (1966), and its progeny, established a right to the presence of counsel as a procedural safeguard to the fifth amendment right against compelled self-incrimination. See Minnick v. Mississippi, ___ U.S. ____, 111 S.Ct. 486, 489-90 (1990). The right to counsel under Miranda does not attach during every encounter between police and an accused. "The police are required to give Miranda warnings only 'where there has been such a restriction on a person's freedom as to render him "in custody."'" California v. Beheler, 463 U.S. 1121, 1124 (1983) (quoting Oregon v. Mathiason, 429 U.S. 492, 495 (1977)).

In concluding that failure to clarify respondent's reference to counsel at the beginning of the polygraph examination was a violation of Miranda, the Utah Court of Appeals implicitly may have determined that respondent was in custody at that time. Respondent had arrived at the police station voluntarily and been met by the polygrapher. There were no indicia of formal arrest when respondent agreed to take the polygraph test. There was no evidence that respondent's freedom to leave was restricted. The mere facts that he was at the police station and that the police may have suspected him of criminal activity did not mean he was in custody or that the Miranda warnings were required. Oregon v. Mathiason, 429 U.S. 492, 495 (1977). The only factor that the court could have relied on for finding that respondent was in custody from the inception of the polygraph exam (thus requiring the police to clarify an ambiguous reference to counsel) is the fact of the exam itself.

Most jurisdictions have adopted the objective, reasonable person test for determining whether a person is in custody. See Hunter v. State, 590 P.2d 888, 894 n.20 and accompanying text (Alaska 1979); People v. Gennings, 808 P.2d 839, 845 (Colo. 1991). As the Utah Court of Appeals noted in its original Sampson decision of September 11, 1990, there is a conflict in the jurisdictions about the effect of a polygraph examination on the requirement for giving Miranda warnings. Sampson, Appendix A at p. 14 n.10. Many jurisdictions either explicitly or implicitly have held that the administration of a polygraph examination does not convert non-custodial questioning into custodial interrogation. See Hunter v. State, 590 P.2d at 894-99 (suspect who went to the police station on his own to take a polygraph test with no indication that he could not have left at any time was not in custody for Miranda purposes); Shiflet v. State, 732 S.W.2d 622, 630-31 (Tex.Cr.App. 1985) (person who voluntarily accompanied police to a certain location to take polygraph was not in custody); Commonwealth v. Benjamin, 346 Pa.Super. 116, 499 A.2d 337, 340-41 (1985) (defendant volunteered to take polygraph, was not in custody), appeal denied, 518 Pa. 635, 542 A.2d 1364 (1986); Kee v. State, 504 So.2d 1365, 1366-67 (Fla.App. 1 Dist. 1987) (defendant not in custody and Miranda warnings not required when she took polygraph test and was told that she had failed); People v. Flint, 150 A.D.2d 964, 542 N.Y.S.2d 63, 64 (A.D.4 Dept.) (defendant remained voluntarily at police department, submitted to and failed polygraph; held not to be in custody), appeal denied, 74 N.Y.2d 739, 545 N.Y.S.2d 114, 543 N.E.2d 757 (1989); Sleek v. State, 499 N.E.2d 751, 752-53 (Ind. 1986) (questioning following examination was not custodial and confession not inadmissible simply because it followed a

polygraph examination); State v. Jenner, 451 N.W.2d 710, 718-19 (S.D. 1990) (suppression argument, grounded on lack of Miranda warnings, fails because defendant not in custody); People v. Lucas, 132 Ill.2d 399, 548 N.E.2d 1003, 1009-10 (1989) (defendant being questioned about his son's alleged kidnapping was not in custody when he took a polygraph exam); State v. Kennedy, 569 A.2d 4, 6-7 (R.I. 1990) (at the request of officers, defendant went to station and agreed to take polygraph exam; defendant confessed prior to the exam and the court found defendant was not in custody); People v. Gennings, 808 P.2d at 845 (voluntary participation in polygraph did not signal custodial interrogation); State v. Rorvik, 224 Mont. 104, 728 P.2d 419, 420 (1986) (defendant transported to another town by police for purposes of polygraph; defendant not in custody); United States ex rel. Sanney v. Montanye, 500 F.2d 411, 415-16 (2d Cir.), cert. denied, 419 U.S. 1027 (1974) (defendant not in custody during two polygraph examinations); United States ex rel. Argo v. Platt, 673 F.Supp. 282, 285-89 (N.D.Ill. 1987) (defendant not in custody during two polygraph examinations on separate days).

On the other hand, other jurisdictions have held that polygraph examinations were custodial. See State v. Wright, 97 N.J. 113, 477 A.2d 1265, 1269 (1984) (noting that strict Miranda-type analysis is typically applied to polygraph confessions); Commonwealth v. Bennett, 439 Pa. 34, 264 A.2d 706, 707 (1970) (state's suggestion that the defendant was not in custody for polygraph was "attempt to have [court] submerge [its] intelligence"); State v. Faller, 88 S.D. 685, 227 N.W.2d 433, 435 (1975) ("situation a lie detector test presents can best be described as a psychological rubber hose"); Creeks v. State, 542 S.W.2d 849, 851 (Tex.Cr.App. 1976) (where investigation has

focused on defendant, Miranda warnings required before polygraph); People v. Carter, 7 Cal.App.3d 332, 88 Cal. Rptr. 546, 549 (Cal.App.2 Dist. 1970) ("Questioning during the course of a lie detector test certainly qualifies as a form of custodial interrogation."), overruled on other grounds, 6 Cal.3d 441, 99 Cal. Rptr. 313, 492 P.2d 1 (1972); State v. Eidson, 73 Or.App. 719, 700 P.2d 285, 289-90 (defendant in custody after five hours in police station during which time a polygraph exam was administered), review denied, 299 Or. 583, 704 P.2d 513 (1985); United States v. Gillyard, 726 F.2d 1426, 1428-29 (9th Cir. 1984) (defendant in custody during polygraph questioning even though he came voluntarily to station to take exam and was released after exam).

Lower courts need guidance in determining what effect a polygraph examination has in deciding the issue of custody during questioning. Some courts have treated the fact that a suspect is taking a polygraph examination as only one factor in the determination of whether the suspect was in custody. See, e.g., State v. Rorvik, 224 Mont. 104, 728 P.2d 419, 420 (1986). Other courts appear to have established a rule that a polygraph is per se custodial. See, e.g., State v. Wright, 97 N.J. 113, 477 A.2d 1265, 1269 (1984). The first approach is consistent with this Court's practice of looking at the totality of the circumstances to determine whether a person is in custody for Miranda purposes. See Oregon v. Mathiason, 429 U.S. 492, 494-95 (1977). The per se custodial approach does not allow for the variety of circumstances in which a polygraph examination may be given. If a person reports voluntarily to a place other than a police station to take a polygraph examination, and leaves at the conclusion of the exam, was he in custody because it was a polygraph examination? If a person reports voluntarily to a police station to take a

polygraph examination, and leaves at the conclusion of the examination, was he in custody? If a person reports voluntarily to any given place and takes a polygraph examination, then voluntarily accompanies the polygrapher or another person to another place, was he in custody because he took a polygraph? The per se custodial approach does not allow for the many different permutations of facts in the context of a polygraph examination. Under that approach, if a polygraph is administered, the subject was in custody, no matter what other facts surrounded the examination. Petitioner asks this Court to grant certiorari and decide this issue.

II.

This Court Should Resolve the Conflict in Authority on the Issue of the Effect to be Given an Ambiguous Reference to Counsel in Response to Gratuitous Miranda Warnings.

If respondent was not in custody at the inception of the polygraph examination when the Miranda warnings were given, the next issue is what effect to give an ambiguous reference to counsel following gratuitous Miranda warnings. If respondent was not in custody, Miranda warnings and a waiver were not required. However, Sgt. Elliot did advise respondent pursuant to Miranda, and respondent asked if he should have a lawyer. As the Utah Court of Appeals stated, respondent's question was not a request; the court called it an "'equivocal reference[] to an attorney.'" Sampson, Appendix A at p.

22 n.15. However, the court treated the statement as an equivocal request for counsel.

Jurisdictions are split as to what effect should be given a request for counsel as a result of non-custodial Miranda warnings. Some hold that such warnings do not convert a situation into custodial interrogation. See Davis v. Allsbrooks, 778 F.2d 168, 171-72 (4th Cir. 1985) ("inadvisable" to impose a rule that reading the Miranda warnings creates a custodial situation); United States v. Gordon, 638 F.Supp. 1120, 1133-34 (W.D.La. 1986) (because there was no custody, the fact that warnings were given does not raise an issue of whether a valid waiver occurred), aff'd., 812 F.2d 965 (5th Cir.), cert. denied, 483 U.S. 1009 (1987); State v. Kennedy, 569 A.2d 4, 8 (R.I. 1990) (advising of Miranda rights will not serve as evidence of an arrest); State v. Taillon, 470 N.W.2d 226, 229 (N.D. 1991) (invocation of right to silence after Miranda warnings in non-custodial setting does not stop police from questioning suspect; giving of warnings and accused's reliance on the rights are relevant factors in evaluating voluntariness of statements); People v. Sohn, 148 A.D.2d 553, 539 N.Y.S.2d 29, 31 (A.D.2 Dept.) (advising of Miranda rights out of "excess of caution" does not preclude finding of no custody), appeal denied, 74 N.Y.2d 747, 545 N.Y.S.2d 122, 543 N.E.2d 765 (1989).

Other jurisdictions have determined that a request for counsel in a non-custodial setting must be honored. See Tukes v. Dugger, 911 F.2d 508 (11th Cir. 1990) (allowing continued questioning after invocation in non-custodial setting would lead accused to believe that no counsel request would be honored), cert. denied, Singletary v. Tukes, 112 S.Ct. 273 (1991).

Lower courts need direction as to what effect, if any, to give to an invocation of counsel in response to

Miranda warnings given in a non-custodial setting. As the Court of Appeals for the Fourth Circuit said in Davis v. Allsbrooks, 778 F.2d 168 (4th Cir. 1985):

> To hold that the giving of Miranda warnings automatically disables police from further questioning upon a suspect's slightest indication to discontinue a dialogue would operate as a substantial disincentive to police to inform suspects of their constitutional protections. It would convert admirable precautionary measures on the part of officers into an investigatory obstruction.

Id. at 172 (footnote omitted). On the other hand, as the Court of Appeals for the Eleventh Circuit stated in Tukes v. Dugger, 911 F.2d 508 (11th Cir. 1990):

> If the state were free to tell a suspect that he had the right to an appointed lawyer, but could, while continuing to interrogate, refuse to provide the lawyer on the ground that the suspect was not actually in custody, the suspect would be led to believe that no request for counsel would be honored.

Id. at 516, n.11.

This Court should decide whether law enforcement officers who, out of an abundance of caution, give the Miranda warnings to a suspect who is not in custody must honor any reference to counsel which arises in response to the gratuitous warnings. A decision that the officers must honor such a reference may cause officers to avoid advising a suspect. A suspect can benefit from being

advised under Miranda even though he or she is not yet in custody. The officer who provides that advice, even though the officer does not believe that the suspect is in custody, has taken "admirable precautionary measures." Davis, 778 P.2d 172. Such measures should not be discouraged.

III.

This Court Should Resolve the Issue of How the Courts Should Treat an Equivocal Invocation of Counsel.

This Court has commented on, but not decided, the issue of how courts should deal with an equivocal invocation of counsel. In Edwards v. Arizona, 451 U.S. 477 (1981), this Court said, "Waiver [of Miranda rights after an earlier request for counsel] is possible, however, when the request for counsel is equivocal." Id. at 486, n.9 (citing Nash v. Estelle, 597 F.2d 513 (5th Cir.) (en banc), cert. denied, 444 U.S. 981 (1979)). The Court noted the conflicting views of how to deal with equivocal invocation of counsel in Smith v. Illinois, 469 U.S. 91, 96, n.3 (1984)[2]; however, the Court did not resolve the conflict because it found that Smith's invocation of right to counsel was unequivocal. Again, in Connecticut v. Barrett, 479 U.S. 523, 529, n.3 (1986), the Court found that Barrett's statements were not ambiguous; consequently, it declared

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[2]The differing views are: 1) All questioning must cease upon any reference to counsel; 2) define a threshold standard of clarity for such references, below which the reference does not trigger the right to counsel; and 3) when an accused make a statement which "arguably can be construed as a request for counsel, the interrogation must cease except for questions designed to "clarify" the statement.

that there was no need to address the conflict in jurisdictions left undecided in Smith.

The present case squarely places before this Court the opportunity to decide the issue of what standard should be adopted for determining the consequences of an equivocal reference to counsel in a custodial setting. In response to the Miranda warnings, respondent merely asked if he needed counsel, then said he had nothing to hide and expressed a willingness to get the polygraph test done. In granting certiorari, this Court should determine whether there should be a threshold for determining which references to counsel will be considered equivocal requests for counsel and what approach law enforcement officers should take in response to equivocal requests for counsel.

IV.

This Court Should Resolve the Conflict in Jurisdictions Regarding the Admissibility of Physical Evidence Obtained by Law Enforcement Arguably in Violation of Miranda.

The final conflict which this Court should resolve is the issue of the admissibility of physical evidence seized arguably after a violation of Miranda. If, in the present case, respondent was not in custody before and during the polygraph, and if the gratuitous Miranda warnings and the equivocal reference to counsel by respondent are without effect in this case, the issue then becomes whether he was in custody when questioned post-polygraph. The Utah Court of Appeals determined that custody had occurred at least by the time Sheriff Hayward began questioning respondent. Sampson, Appendix A at p. 15. If respondent

was in custody at that time, Miranda warnings should have been administered prior to any questioning; failure to administer the warnings and obtain a valid waiver would preclude admission of respondent's initial statement that his daughter was dead. It arguably could also preclude admission of any testimonial acts by respondent in taking the officers to his daughter's body. However, as argued to the court of appeals on rehearing, the second advisement of Miranda rights and the uncoerced waiver of the right to counsel by respondent after he was returned to the police station allows the use of his subsequent statements. This argument is based on Oregon v. Elstad, 470 U.S. 298 (1985), in which this Court held that a simple failure to administer Miranda warnings, unaccompanied by any actual coercion, does not preclude admission of a statement obtained after a subsequent voluntary and informed waiver. Id. at 309.[3]

Petitioner argued on rehearing that the physical evidence, i.e., the body, and medical testimony based on an autopsy performed on the body were admissible even if there had been a violation of Miranda during the questioning of respondent at the time of the polygraph. That argument was also rejected by the court of appeals. Sampson, Appendix B at pp. 12-13 n.8.

As lower courts have noted, this Court has not directly addressed the admissibility of physical evidence discovered as a result of statements taken in violation of Miranda. See United States v. Gonzalez-Sandoval, 894 F.2d 1043, 1047 (9th Cir. 1990) (whether non-testimonial

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[3]It could also be argued that the court of appeals misapplied the holding o Elstad when it determined on rehearing that respondent's statements taken aft a voluntary and informed waiver after a second Miranda warning wer inadmissible.

physical evidence obtained as a result of Miranda is inadmissible as "fruit of the poisonous tree" has not yet been conclusively decided); United States v. Sangineto-Miranda, 859 F.2d 1501, 1516 n.8 (6th Cir. 1988) (the Supreme Court has not directly addressed this issue, although it has had the opportunity to do so); State v. Preston 411 A.2d 402, 406 (Me. 1980) ("Although it has had several opportunities to do so, the Supreme Court has never ruled that real evidence the police acquire as a consequence of statements they obtain from a defendant in violation of his rights under Miranda is subject to the same exclusionary rules as evidence derived from a fourth amendment violation").

As with the other issues raised in this petition, jurisdictions are in conflict about the admissibility of physical evidence obtained as a consequence of statements taken in violation of Miranda. Some treat the physical evidence in the same fashion that this Court addressed the admission of subsequent statements in Elstad. See United States v. Gonzalez-Sandoval, 894 F.2d 1043, 1047-48 (9th Cir. 1990) (where there is no evidence of coercion or denial of due process in eliciting statements, the object of fifth amendment exclusionary rule is not served by barring admission of derivative evidence); United States v. Cherry, 794 F.2d 201, 207-208 (5th Cir. 1986) (rejection of "fruit of poisonous tree" doctrine in Michigan v. Tucker, 417 U.S. 433 (1974), to testimony derived from Miranda violation applies to admissibility of physical evidence obtained in violation of Miranda but not in violation of fifth amendment), cert. denied, 479 U.S. 1056 (1987); State v. Dellorfano, 128 N.H. 628, 517 A.2d 1163, 1167-68 (1986) (applying the analysis in Elstad to admissibility of physical evidence "derived" from the unwarned confession); State v. Wethered, 110 Wash.2d 466, 755 P.2d

797, 800-802 (1988) (extending the reasoning in Elstad and Tucker to hold that physical evidence derived from non-Mirandized testimonial act need not be suppressed); In re Owen F., 70 Md.App. 678, 523 A.2d 627, 631-32 (unwarned, but voluntary, statement leading to discovery of tangible evidence does not preclude admission of evidence), cert. denied, 310 Md. 275, 528 A.2d 1286 (1987); State v. Preston 411 A.2d 402, 406-408 (Me. 1980) (pre-Elstad case cited Tucker in concluding that Miranda violation did not require suppression of physical evidence); Commonwealth v. Meehan, 377 Mass. 552, 387 N.E.2d 527, 536 (1979), cert. dismissed, 445 U.S. 39 (1980) (pre-Elstad, cites Tucker for suggestion that, in certain circumstances, evidence secured as result of violation of Miranda need not be excluded).

Other jurisdictions have held that a Miranda violation demands that derivative physical evidence be excluded. See State v. Miller, 709 P.2d 225, 241 (Or. 1985) (narrowly construing Elstad, held that questioning of a suspect after he has asserted his right to counsel is a Fifth Amendment violation and doctrine of Wong Sun v. United States, 371 U.S. 471 (1963), applies), cert. denied, 475 U.S. 1141 (1986); United States ex rel. Argo v. Platt, 673 F.Supp. 282, 285 n.4 (N.D.Ill. 1987) (with no mention of Elstad, held that admissibility of physical evidence depended on admissibility of inculpatory statements); People v. Connelly, 702 P.2d 722, 729-30 (Colo. 1985), reversed on other grounds, Colorado v. Connelly, 479 U.S. 157 (1986) (makes no distinction between Miranda and Fifth Amendment violation when holding that Wong Sun applied to admission of physical evidence obtained in violation of right to counsel); Boles v. Foltz, 816 F.2d 1132, 1135 (6th Cir.) (without analysis, court affirmed trial court's determination that admission of derivative evidence

after violation of Edwards v. Arizona, 451 U.S. 477 (1981), was harmless error), cert. denied 484 U.S. 857 (1987); People v. Creach, 69 Ill.App.3d 874, 387 N.E.2d 762, 772 (1979) (citing Tucker but without analysis, court held that derivative evidence obtained as the result of a Miranda violation should be suppressed), cert. denied, 449 U.S. 1010 (1980); State v. Greene, 91 N.M. 207, 572 P.2d 935, 943 (1977) (question of whether Miranda requires exclusion of derivative evidence acquired as a result of Miranda warning has not been decided by Supreme Court; admissibility of physical fruits of inadmissible statements turns on legality of interrogation); State v. Williams, 285 N.W.2d 248, 255-56 (Iowa 1979) ("It has long been the rule that evidence which is derived from such . . . unlawfully gained statements must also be suppressed"), cert. denied, 446 U.S. 921 (1980).

Applying Elstad in divergent ways, lower courts have either admitted or excluded physical evidence derived from statements taken in alleged violation of Miranda. As the Court of Special Appeals of Maryland stated:

> [W]e believe the holding in Elstad applies with equal force to cases in which an unwarned statement leads directly to the discovery of tangible, real evidence. This belief springs from the fact that the exclusionary rule, when enforced in the Miranda setting, is intended to avoid unreliable evidence borne of coercion and to deter police misconduct. In the case of tangible derivative evidence, the potential for untrustworthiness does not inhere in the article uncovered. Further, misconduct remains deterred with the knowledge that, if

> acquired through actual coercion, the derivative evidence is tainted.

In re Owen F., 70 Md.App. 678, 523 A.2d 627, 632, cert. denied, 310 Md. 275, 528 A.2d 1286 (1987). In contrast, the Oregon Supreme Court refused to apply Elstad when it applied the "fruit of the poisonous tree" doctrine and held that physical evidence was inadmissible because it was derived from a Miranda-violative confession. In State v. Miller, 300 Or. 203, 709 P.2d 225 (1985), cert. denied 475 U.S. 1141 (1986), that court said:

> In . . . a 6-3 decision authored by Justice O'Connor, the Court stated in dictum that evidence which is the "fruit" of a Miranda violation need not be suppressed under a derivative evidence analysis. The actual holding in Elstad, a successive interrogation case, however, is considerably narrower.

Id. at 241.

This Court should take the opportunity that the present case presents to determine definitively the admissibility of physical evidence obtained as a result of a statement taken in violation of Miranda. The purposes behind Miranda are not served by excluding physical evidence derived from an alleged Miranda violation. The purposes of Miranda are served by disallowing use of a statement taken in violation of Miranda in the state's case-in-chief. This Court's decision not to extend the Wong Sun "fruit of the poisonous tree" doctrine to subsequent statements obtained in violation of Miranda (as opposed to statements coerced in violation of the Fifth Amendment) argues for a decision that physical evidence obtained in

violation of Miranda (but not in violation of the Fifth Amendment) should not be excluded. See Elstad, 470 U.S. at 305-306.

CONCLUSION

For these reasons, petitioner requests that a writ of certiorari issue in this case.

Respectfully submitted,

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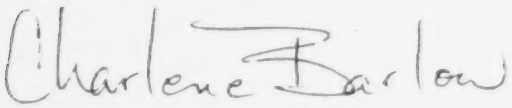

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APPENDICES

APPENDIX A

IN THE UTAH STATE COURT OF APPEALS

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State of Utah,	)	OPINION
	)	(For Publication)
Plaintiff and Appellee,	)	
	)	
v.	)	Case No. 890327-CA
	)	
Carlos R. Sampson,	)	F I L E D
	)	(September 11, 1990)
Defendant and Appellant.)		

Third District, Salt Lake County
The Honorable David S. Young

Attorneys: Andrew A. Valdez, Elizabeth A. Bowman, and Richard G. Uday, Salt Lake City, for Appellant
R. Paul Van Dam and Charlene Barlow, Salt Lake City, for Appellee

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Before Judges Billings, Greenwood, and Orme.

ORME, Judge:

Defendant appeals his conviction for criminal homicide, murder in the second degree, a first degree

felony in violation of Utah Code Ann. § 76-5-203 (1990). We reverse and remand for a new trial.

On November 24, 1986, at approximately 10:30 p.m., defendant entered a 7-Eleven store in Salt Lake County and told the clerks that his daughter had been kidnapped. He asked them to call the police, which they did.

Deputies from the Salt Lake County Sheriff's Officer responded. Defendant informed them that his daughter had been abducted from his truck. He gave them a description of his daughter and a photograph. The officers investigated the alleged kidnapping until 4:00 a.m. At some point during the evening, defendant was informed the police did not believe his story. The officers asked defendant to come to headquarters the following morning for a polygraph examination. He agreed.

At approximately 10:30 on November 25, defendant arrived at police headquarters. He was met by the polygraph examiner, Sergeant Elliot, who had been briefed about the events which occurred on the prior evening. Defendant was escorted to a small interrogation room, hooked up to a polygraph machine, and instructed about how polygraph machines worked. Sgt. Elliot then explained the purpose for giving defendant the test. He said:

> When we walk out of here we ought to be able to tell the detectives Carlos is truthful when he says the child was taken out of the truck, he had not prearranged with anyone to take the child. Uh, also, Carlos is not involved in the death of the child if the child

> is, in fact, dead. And, uh, those are the two things that we will accomplish today.[1]

After explaining to defendant the purpose of the test, Sgt. Elliot gave defendant the Miranda warnings. He began by stating: "Because you are in the cop shop there is no doubt in your mind that this is the police station and, uh, because you are in taking a polygraph from a law enforcement agency I must advise you of your rights again."[2] After reading defendant each of his rights, the following exchange ensued:

> Elliot: Okay, having these rights in mind do you wish to talk to me now.

---

[1]These purposes were again repeated during the exam, with even more specificity. Later in the exam, Sgt. Elliot stated:

> Okay, good, okay, uh, at the beginning of the test I told you what the things were that we needed to show. Number one is that you did not arrange with anyone to take the child but that you haven't got someone taking care of her, she is not hidden out and you are not doing this to deprive Antoinette visitation of the child. And, uh, secondly, you did nothing to injure the child and you, and if she in fact is not alive, did not cause her death, right?

[2]It is not clear from the record why Sgt. Elliot stated that he had to advise defendant of his rights "again." It is clear, however, that the first and only Miranda warnings defendant received prior to his formal arrest were given by Sgt. Elliot at the outset of the polygraph examination.

Sampson: Well, uh, should I have a lawyer, I mean, well, I'm really not worried about anything, it is just that . . . .

Elliot: Okay, if you are not worried about anything I would say that is fine, let's go ahead and proceed. Let's get this thing done and get it over with and see what we can do.

Sampson: I'm willing to get it over with.

Defendant then read and signed a form listing his Miranda rights and indicating his willingness to take the polygraph test.

During the polygraph examination, Sgt. Elliot asked defendant whether he arranged the disappearance or caused the death of his child and whether he knew where she was hidden.[3] He asked defendant this series of questions four times. To the question concerning where his daughter was hidden, defendant responded in the negative each time and each time the polygraph suggested a deceitful response. After the last set of questions, Sgt. Elliot informed defendant about the test results. He asked defendant why his response to the question concerning whether he knew where his daughter was hidden appeared to be false. Defendant said he thought maybe the child's mother had done something with her.

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[3]The specific inculpatory questions asked during the examination were:

1) Have you caused the death of Miyako?
2) Do you know where Miyako is hidden now?
3) Have you arranged the disappearance of Miyako?

After concluding the examination, Sgt. Elliot and defendant went to find Salt Lake County Sheriff Pete Hayward. Sgt. Elliot told Sheriff Hayward about the test results. He told him that he believed defendant had been untruthful and informed him that defendant had been "Mirandized," but apparently did not acquaint the sheriff with the particulars of defendant's responses after his rights had been read to him.

Sheriff Hayward then returned with defendant to the polygraph room for further questioning. He did not give defendant the Miranda warnings.[4] He informed defendant that there were inconsistencies in his story and that he did not believe defendant was telling the truth. He then asked defendant whether he had injured his daughter. Ultimately, defendant stated his daughter was dead and that he could show the police where she was located.

Defendant accompanied Sheriff Hayward and another deputy to a dumpster in American Fork where his daughter's body was located. After retrieving the body, the officers placed defendant under arrest and returned him to Salt Lake City. When the officers again met with defendant, defendant was read his Miranda rights. He agreed to talk with the investigating officer, who thereafter questioned him concerning the circumstances surrounding his daughter's death.

Prior to trial, defense counsel filed a motion to suppress all statements made by defendant during and after

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[4]It is not entirely clear why the sheriff did not give defendant his Miranda warnings. Apparently, however, he relied upon Sgt. Elliot's explanation that defendant had been "Mirandized."

the polygraph examination on November 25, 1986, and all evidence derived as a result of those statements. Counsel argued that the police officers had violated defendant's Miranda rights by continuing to question him after he made an equivocal request for counsel. The trial court denied the motion.

In support of its decision to deny defendant's motion to suppress, the court stated in pertinent part:

> The court finds, first, that as you have agreed, the standard of evidence must be a preponderance of the evidence[5] to establish the voluntariness of the interrogation and waiver.
>
> Court finds that the defendant clearly understood what his rights were and what he was waiving, that there is nothing in the record to show that the police did anything or acted in any way improperly so as to

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[5]At least one Utah case has recognized "preponderance of the evidence" as the appropriate standard for determining the voluntariness of a waiver of Miranda rights. See State v. Moore, 697 P.2d 233, 236 (Utah 1985). The preponderance standard is difficult to square with Miranda's holding that the state bears a heavy burden, if counsel was not present, to show a knowing and intelligent waiver of the defendant's Miranda rights. See Miranda v. Arizona, 384 U.S. 436, 475 (1966). Nonetheless, the United States Supreme Court has adopted the "preponderance of the evidence" test in evaluating Miranda waiver questions. Colorado v. Connelly, 479 U.S. 157, 107 S. Ct. 515, 523 (1986).

constitute any kind of coercion[6] in this matter so as to cause the defendant not to fully understand his rights and to leave him in a position where he was acting in a coerced sort of way . . . .

I believe he had an unfettered right of choice, that he did not request an attorney, that the language "Well, ah, should I have a lawyer, I mean, well, I'm really not worried about anything, it is just that . . ." is not sufficient to cause the police to be concerned as to the claim or any suggestion that the defendant wished to claim a right to counsel.

I also find that there was no need to give continuous advice as to subsequent requests for the selection of counsel[7] or the waiver of the same.

I also find that the forum was adequate, the [rights] were clearly explained to the defendant. He voluntarily and knowingly waived his right to counsel and I cannot find that the motion to suppress should be granted and, therefore, it is denied.

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[6]The court's comment on coercion represents a bit of an overstatement in view of Miranda's recognition that custodial interrogation is inherently coercive. See 384 U.S. at 467.

[7]Despite the court's phraseology in its remarks from the bench, it is apparent from the record that defendant never made any "subsequent requests" for counsel after his statement to Sgt. Elliot.

A five-day jury trial was held in September 1987. Having lost his motion to suppress, defendant sought and obtained a continuing objection to the admission of evidence resulting from the police interrogation. At the conclusion of the trial, the jury found defendant guilty of second degree homicide. He was sentenced to a term of five years to life at the Utah State Prison.

Defendant has raised numerous issues on appeal, but his primary contention is that the court committed prejudicial error when it denied his motion to suppress. Because we must reverse and remand on this issue, we need not address the other issues raised by defendant.

Neither party has identified the standard of review for this appeal. However, both parties apparently concede that the trial court's ultimate conclusions concerning the waiver of defendant's Miranda rights, which conclusions were based upon essentially undisputed facts, in particular the transcript of Sgt. Elliot's colloquy with defendant, present questions of law reviewable under a correction-of-error standard. Such a conclusion is consistent with the general notion that a trial court's "findings" based upon undisputed facts present questions of law on appeal. Diversified Equities, Inc. v. American Sav. & Loan Assoc., 739 P.2d 1133, 1136 (Utah Ct. App. 1987) (quoting City of Spencer v. Hawkey Sec. Ins. Co., 216 N.W.2d 406, 408 (Iowa 1974)). Cf. Transamerica Cash Reserve, Inc. v. Dixie Power & Water, Inc., 789 P.2d 24, 25 (Utah 1990) (same standard for review of summary judgment, which necessarily involves undisputed facts). See also People v. Russo, 148 Cal. App. 3d 1172, 196 Cal. Rptr. 466, 468 (1983) (where Miranda warnings and ensuing discussion were recorded, facts deemed undisputed and appellate court

required to "independently assess whether [defendant] knowingly and intelligently waived his rights"). Thus, we do not accord any particular deference to the trial court's conclusions, although couched as findings, but, rather, review them for correctness. Scharf v. BMG Corp., 700 P.2d 1068, 1070 (Utah 1985).

In Miranda v. Arizona, 384 U.S. 436 (1966), the United States Supreme Court stated that "the prosecution may not use statements . . . stemming from custodial interrogation of the defendant unless it demonstrates the use of procedural safeguards effective to secure the privilege against self-incrimination." Id. at 444. One of those procedural safeguards is a warning that the defendant has the right to an attorney during custodial interrogation. Id. Moreover, the Court noted that if defendant "indicates in any manner and at any stage of the process that he wishes to consult with an attorney before speaking there can be no questioning." Id. at 444-45. Finally, when custodial interrogation continues without the presence of a defense attorney and damaging evidence results from the interrogation, the state has a heavy burden to show that the defendant knowingly and intelligently waived his Miranda rights. Id. at 475.

We must address two questions in this appeal. First, we must determine whether defendant was subject to "custodial interrogation" at the time he made his incriminating statements. Second, assuming custodial interrogation, we must determine whether defendant requested, or knowingly and intelligently waived his right to, counsel.

CUSTODIAL INTERROGATION

Initially, defendant claims the state failed to raise below the issue of whether there actually was a "custodial interrogation" and thus should be precluded from arguing on appeal that there was not. See generally State v. Marshall, 791 P.2d 880, 885-87 (Utah Ct. App. 1990). Though we agree the state did not dwell on the issue, it was sufficiently raised at the suppression hearing to be preserved for this appeal. We note, however, that the trial court did not base its denial of the motion to suppress upon the lack of custody nor intimate any doubt that the colloquy between Sgt. Elliot and defendant occurred in conjunction with a custodial interrogation. Instead, it concluded that defendant was informed of his rights, understood his rights, and voluntarily waived them--conclusions which would be irrelevant if the court thought there had been no custodial interrogation.

In Miranda, the United States Supreme Court defined "custodial interrogation" as "questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way." Miranda v. Arizona, 384 U.S. 436, 444 (1966). The Court expanded on this definition in Oregon v. Mathiason, 429 U.S. 492 (1977) (per curiam). "Miranda warnings are required only where there has been such a restriction on a person's freedom as to render him 'in custody.'" Id. at 495. Later, in California v. Beheler, 463 U.S. 1121 (1983) (per curiam), the Court stated that "the ultimate inquiry is simply whether there is a 'formal arrest or restraint on freedom of movement' of the degree associated with a formal arrest." Id. at 1125.

Moreover, the United States Supreme Court has indicated that the test is an objective one, i.e., that "the only relevant inquiry is how a reasonable man in the suspect's position would have understood his situation." Berkemer v. McCarty, 468 U.S. 420, 442 (1984). See, e.g., Hunter v. State, 590 P.2d 888, 895 (Alaska 1979) (The question is not whether the particular defendant considered himself in custody, but whether a "reasonable person [under the same circumstances] would feel he was not free to leave and break off police questioning."); People v. Algien, 180 Colo. 1, 501 P.2d 468, 471 (1972) (en banc).

The Utah Supreme Court has identified several key factors to consider in order to determine when a defendant

> who has not been formally arrested is in custody. They are: (1) the site of interrogation; (2) whether the investigation focused on the accused; (3) whether the objective indicia of arrest were present; and (4) the length and form of interrogation.

Salt Lake City v. Carner, 664 P.2d 1168, 1171 (Utah 1983). Another factor which we find pertinent to our analysis was recognized by our Oregon counterpart in State v. Herrera, 49 Or. App. 1075, 621 P.2d 1209 (1980). That factor is (5) whether the defendant came to the place of interrogation freely and willingly. Id. at 1212. We now apply these five factors, along with the objective standard adopted in Berkemer, to the undisputed facts in this case.

A brief mention of factors (1), (3) and (5) is sufficient because we find them relatively "neutral." Concerning factor (1), the site of interrogation was the police station.

Station-house questioning lends itself to a finding of custody, a concept which Sgt. Elliot recognized in his "cop shop" introductory remark, although that fact alone is not conclusive. See, e.g., Mathiason, 429 U.S. at 495. Considering factor (3), defendant was apparently not securely restrained or told that he was under arrest until after his daughter's body was discovered. However, it is pertinent to note that he was not specifically informed of his freedom to leave[8] and that once the polygraph examination started, he was restrained in the limited sense that he was hooked to the polygraph machine.[9] Turning to factor (5), the defendant went voluntarily to the police station after receiving an invitation to do so. The fact that he went voluntarily, however, does not mean he was free to leave during the entire remainder of the interrogation.

The two factors which conclusively tip the scale and persuade us that defendant was in custody are factors (2), the focus of the investigation, and (4), the form of the interrogation. The interplay of these two factors at the time defendant made incriminating statements would lead a reasonable person to believe that he was not free to leave.

Concerning factor (2), the state essentially concedes that the investigation in this case had focused exclusively

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[8]Under certain circumstances, even defendants who are told they are free to leave will nonetheless be held to have been subjected to custodial interrogation. See, e.g., United States v. Lee, 699 F.2d 466, 467-68 (9th Cir. 1982) (per curiam).

[9]According to the transcript of the polygraph examination, the polygraph machine was attached to defendant by two tubes encircling his trunk, finger plates on his ring and index fingers, and a blood pressure cuff on his right arm.

on defendant. Before the conclusion of the evening when defendant reported the fictitious kidnapping, officers had informed defendant that they did not believe his story. As a result of their disbelief, they requested defendant to return the following morning for a polygraph test. Nothing in the record suggests other suspects were sought or questioned, or other leads pursued, in the meanwhile. The questions asked during the polygraph examination clearly indicate a strong suspicion that defendant had kidnapped or killed his own daughter. It is obvious from these facts that defendant was the prime, if not exclusive, suspect of the police investigation. A reasonable person under the circumstances would surely so have concluded, especially given the expressed disbelief at his story.

Finally, factor (4) weighs heavily in favor of a determination of custody. Utah courts have placed a great deal of emphasis on the form of the questioning in these types of cases. As long as questioning remains merely investigatory, courts have not found custody. See, e.g., State v. Kelly, 718 P.2d 385, 391 (Utah 1986). However, when investigatory questioning shifts to accusatory questioning, custody is likely and Miranda warnings become necessary. Carner, 664 P.2d at 1170. See also Kelly, 718 P.2d at 391. The change from investigatory to accusatory questioning occurs when the "police have reasonable grounds to believe that a crime has been committed and also reasonable grounds to believe that the defendant committed it." Carner, 664 P.2d at 1171. See also Kelly, 718 P.2d at 391.

Assuming, without deciding, that the polygraph examination itself was merely investigatory,[10] we find that the questioning became accusatory when Sgt. Elliot and Sheriff Hayward determined that defendant had lied on the exam. The officers knew prior to the polygraph exam that a crime had been committed. They suspected kidnapping and possibly even murder. Moreover, they clearly suspected defendant as the perpetrator of the crime. The polygraph exam results merely confirmed their suspicions. Knowing the suspicions of the police and then being confronted with the polygraph exam results, a reasonable person in defendant's position would not have considered

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[10]In view of the result we reach, we need not decide in this case whether the polygraph examination as such was accusatory interrogation and whether defendant was in custody from the inception of the exam. We note, however, that numerous courts have leaned toward finding such examinations to be custodial, a view which seems to command majority support and to be well-reasoned. See, e.g., State v. Wright, 97 NJ. 113, 477 A.2d 1265, 1269 (1984) (noting that strict Miranda-type analysis is typically applied to polygraph confessions); Commonwealth v. Bennett, 439 Penn. 34, 264 A.2d 706, 707 (1970) (state's suggestion that defendant was not in custody for polygraph was "attempt to have [court] submerge [its] intelligence"); State v. Faller, 277 N.W. 2d 433, 435 (S.D. 1975) ("situation a lie detector test presents can best be described as a psychological rubber hose"); Creeks v. State, 542 S.W.2d 849, 851 (Tex. 1976) (where investigation has focused on defendant, Miranda warnings required before polygraph); People v. Carter, 7 Cal. App. 3d 332, 88 Cal. Rptr. 546, 549 (1970) ("Questioning during the course of a lie detector test certainly qualifies as a form of custodial interrogation."), overruled on other grounds, 6 Cal. 3d 441, 492 P.2d 1, 99 Cal. Rptr. 313 (1972). But see, e.g., Whalen v. State, 434 A.2d 1346, 1352 (Del. 1980) ("appearance at the police station for the polygraph test demonstrates a waiver of his Miranda rights"), cert. denied, 455 U.S. 910 (1982); People v. Bailey, 140 A.D.2d 356, 527 N.Y.S.2d 845, 847-48 (1988) (willingness to aid in investigation demonstrated that polygraph not custodial).

himself free to leave at that time.[11] Thus, we hold that, at least as of the time of Sheriff Hayward's questioning of defendant, defendant was subject to custodial interrogation and entitled to proper Miranda warnings.

This case is similar to, and the result we reach consistent with, the Colorado case of People v. Algien, 180 Colo. 1, 501 P.2d 468 (1972) (en banc). In Algien, the defendant, along with other individuals, was suspected of arson. 501 P.2d at 469. He voluntarily submitted to a polygraph examination. Id. At no time was he advised of his Miranda rights. Id. at 470. Prior to the examination he was informed that the purpose of the test was to determine his involvement in the fire. Id. at 469-70. He was then asked questions concerning his guilt. Id. The exam was given three times and each time the test indicated his negative responses were not truthful. Id. at 470. At the conclusion of the test, he was confronted with the opinion that he was lying and, after discussing the matter, defendant confessed. Id.

The trial court in Algien found that once the officers concluded defendant was lying during the exam, the suspicion of guilt focused on him and the officers should have read him his Miranda rights. Id. The Colorado Supreme Court agreed with the trial court and held that "a reasonable person would with logic conclude that he could

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[11]The state cites testimony to the effect that defendant did not consider himself under arrest even after he was formally arrested, suggesting this demonstrates that defendant could not have believed he was in custody when he first confessed. This evidence is at most a commentary on defendant's acumen. Under the objective "reasonable person" test, defendant's subjective belief about custody is not relevant. Berkemer v. McCarty, 468 U.S. 420, 442 (1984).

not leave the premises of his own free will but would be detained for formal arrest." Id. at 471. Consequently, it affirmed the decision of the trial court to suppress defendant's confession.

Other courts have applied an Algien-type analysis to post-polygraph confessions. See, e.g., State v. Wright, 97 N.J. 113, 477 A.2d 1265, 1269 (1984) ("When defendants are not advised of their Miranda rights, or do not properly waive them, confessions elicited after a polygraph test are typically suppressed."); People v. Harris, 128 A.D.2d 891, 513 N.Y.S.2d 817, 818 (1987) (mem.) (confession admissible because defendant appeared voluntarily for polygraph test and fully advised of rights before post-polygraph confession). The rationale of these polygraph cases comports with our view of custodial interrogation and thus we adopt their reasoning in this case.

We need not decide whether defendant was in custody from inception of the polygraph examination[12] because no

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[12]But see note 10, supra. It is interesting to note that the polygraph examiner considered Miranda warnings at the outset of the polygraph examination to be a necessity. He stated: "Because you are in the cop shop there is no doubt in your mind that this is the police station and, uh, because you are in taking a polygraph from a law enforcement agency I must advise you of your rights . . . ." But see People v. Sohn, 148 A.D.2d 553, 539 N.Y.S.2d 29, 31 (1989) (mem.) (giving of Miranda warnings was "apparently out of an 'excess of caution' [and did] not preclude a finding that [defendant] was not in custody").

Sergeant Elliot's approach, whether or not legally required, surely seems prudent, if for no other reason than that it forecloses the possibility a suspect will blurt out a confession after his deception has been ascertained but before Miranda warnings can be issued. Moreover, as an arm of the state, the police have a responsibility to

confession was elicited until after the exam was completed and the sheriff summoned. It is sufficient to conclude that, Sgt. Elliot having determined defendant was lying in the exam, Miranda warnings were necessary before further questioning could properly proceed.

It is clear from the record that defendant was not given Miranda warnings between the conclusion of the polygraph exam and the time he was formally arrested.[13] Thus,

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protect the constitutional rights of the citizenry, and erring on the side of giving the Miranda warnings before they are strictly required advances that function, as well as minimizes the risk that important evidence will be excluded because the warnings were not given early enough in the process.

[13]As indicated previously, Sheriff Hayward apparently relied upon Sgt. Elliot's claim that defendant had been properly "Mirandized" at the commencement of the polygraph exam. Although Sheriff Hayward, out of the same abundance of caution that may have motivated Sgt. Elliot, should ideally have given new Miranda warnings to defendant prior to interrogating him, the earlier warnings would have sufficed had Sgt. Elliot elicited a clear waiver of those rights from defendant at that time. See State v. Martinez, 595 P.2d 897, 899-900 (Utah 1979) (the law does not require repetition of Miranda rights within a short period of time and a continuous sequence of events even though defendant's status may actually change in the interim).

The state did not argue that Sheriff Hayward's "good faith" reliance upon Sgt. Elliot's claim he previously issued Miranda warnings warranted an exception to the exclusionary rule. However, we note that, contrary to the trend in the Fourth Amendment area, courts have declined to create a "good faith" exception in the context of the Fifth Amendment. United States v. Scalf, 708 F.2d 1540, 1544 (10th Cir. 1983) (per curiam) ("once a suspect has invoked the right to counsel, knowledge of that request is imputed to all law enforcement officers who subsequently deal with the suspect"). See also Arizona v. Roberson, 108 S.Ct. 2093, 2101 (1988) (implicitly rejecting "good

unless we find that defendant's Miranda rights were adequately protected by reason of the exchange at the outset of the polygraph examination undertaken by Sgt. Elliot,[14] there was no adequate "Mirandizing" of defendant

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faith" argument); White v. Finkbeiner, 687 F.2d 885, 887 n.9 (7th Cir. 1982) (declining to create exception absent clear indication from United States Supreme Court), vacated on other grounds, 465 U.S. 1075 (1984).

An excellent treatment of a possible "good faith" exception to the Fifth Amendment exclusionary rule is found in M. Gardner, The Emerging Good Faith Exception to the Miranda Rule--A Critique, 35 Hastings L.J. 429 (1984). Professor Gardner concludes:

> While there may be reason to doubt the constitutional necessity of the fourth amendment exclusionary rule, the fifth amendment privilege is itself a constitutionally required exclusionary rule. Whereas a fourth amendment violation occurs at the moment of the unlawful privacy violation, violations of the privilege against self-incrimination do not occur unless and until the government uses the tainted evidence against the defendant in a criminal proceeding. Although alternatives to the exclusionary rule might conceivably be developed to protect fourth amendment privacy interests, no alternative could possibly protect the fifth amendment values of maintaining an accusatorial system and respecting the dignity of criminal defendants. If use of compelled self-incriminating evidence is permitted, the fifth amendment's protection is destroyed.

Id. at 462-63.

[14]We note that defendant was given a second set of Miranda warnings after he had informed Sheriff Hayward that his daughter was dead, gone with the police to American Fork to retrieve the body, been arrested, and been returned to Salt Lake City. Apparently recognizing

before he gave his custodial confession. We now examine whether defendant validly waived his Miranda rights at that time.

WAIVER

On appeal, defendant does not argue that the state failed to adequately inform him of his Miranda rights. Prior to the polygraph examination, Sgt. Elliot carefully informed defendant of each of his rights. Instead, defendant argues that he made an "equivocal request" for counsel which the state failed to clarify and, if appropriate, to honor. It is telling that the state does not address this issue on appeal, but instead puts all its eggs in the "no custodial interrogation" basket. Nonetheless, because the state stops short of conceding the point and in view of its importance, we will address the issue in some detail.

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that by that time all the damage had been done, the state does not argue the second set of Miranda warnings are of any consequence to our analysis.

Defendant, on the other hand, argues that because he had previously invoked his right to counsel, albeit equivocally; had not been provided an attorney; and had not initiated any subsequent interrogation with the police, the fruits of the post-arrest interrogations must also be suppressed. We agree. In Edwards v. Arizona, 451 U.S. 477 (1981), the United States Supreme Court held that once a defendant has invoked his right to counsel, statements made without counsel in subsequent interrogations initiated by the police, even when pursuant to renewed Miranda warnings, must be suppressed. Id. at 484-87. See also State v. Moore, 697 P.2d 233, 237 (Utah 1985) (accused must initiate conversation). The rule in Edwards applies even more forcefully in a case such as this where the subsequent interrogation is prompted by, and designed to explain, information which has come to the police as a direct result of an earlier Miranda violation.

Initially we note that, though a defendant may waive his rights to remain silent and to have an attorney present during custodial interrogation, "these waivers must be both intentional and made with full knowledge of the consequences, and the defendant is given the benefit of every reasonable presumption against such a waiver." State v. Fulton, 742 P.2d 1208, 1211 (Utah 1987), cert. denied, 484 U.S. 1044 (1988). See also Brewer v. Williams, 430 U.S. 387, 404 (1977). Consequently, the state has a heavy burden to establish both that a defendant understood his Miranda rights and that he voluntarily waived them. State v. Velarde, 734 P.2d 440, 443 (Utah 1986).

The state argued below, and the trial court found, that defendant's statement "Well, ah, should I have a lawyer, I mean, well, I'm really not worried about anything, it is just that . . ." did not qualify as even an equivocal request for counsel which the police had to be concerned about. We disagree.

In Miranda, the United States Supreme Court stated: "If (defendant] indicates and at any stage of the process that he wishes to consult with an attorney before speaking there can be no questioning." 384 U.S. at 444-45 (emphasis added). Thus, a defendant's "request for counsel may be ambiguous or equivocal," Smith v. Illinois, 469 U.S. 91, 95 (1984) (per curiam), and still qualify as an invocation of Miranda rights.

This court dealt with an equivocal request for counsel in State v. Griffin, 754 P.2d 965 (Utah Ct. App. 1988). In Griffin, the defendant stated during interrogation, "This is a lie. I'm calling an attorney." Id. at 966. We held that this statement "was arguably equivocal." Id. at 969.

Defendant's statement in this case was less forceful than that in Griffin. However, other jurisdictions have found statements very similar to the one in this case to have constituted equivocal requests for counsel. See, e.g., United States v. Cherry, 733 F.2d 1124, 1127 (5th Cir. 1984) ("Maybe I should talk to an attorney before I make a further statement."), cert. denied, 479 U.S. 1056 (1987); United States v. Fouche, 776 F.2d 1398, 1405 (9th Cir. 1985) ("might want to talk to a lawyer"), cert. denied, 486 U.S. 1017 (1988); United States v. Prestigiacomo, 504 F. Supp. 681, 683 (E.D.N.Y. 1981) (mem.) ("maybe it would be good to have a lawyer"); Cheatham v. State, 719 P.2d 612, 618 (Wyo. 1986) (after being asked if he wanted to talk, defendant responded "Well I don't care, I'd like to see a lawyer, too you know"); Hampel v. State, 706 P.2d 1173, 1176 (Alaska Ct. App. 1985) ("I've got one question . . . [and the question is concerning a lawyer] . . . how would I be able to get one, a lawyer?"); People v. Russo, 148 Cal. App. 3d 1172, 196 Cal. Rptr. 466, 468 (1983) ("I don't know if I should have a lawyer here or what."); State v. Moulds, 105 Idaho 880, 673 P.2d 1074, 1083 (Ct. App. 1983) ("Maybe I need an attorney"); State v. Smith, 34 Wash. App. 405, 661 P.2d 1001, 1003 (1983) ("Do you think I need an attorney?"). See also United States v. Porter, 764 F.2d 1, 6 (1st Cir. 1985) (unsuccessful call to attorney's office in presence of officer treated as equivocal request for counsel), cert. denied, 481 U.S. 1048 (1987); People v. Quirk, 129 Cal. App. 3d 618, 181 Cal. Rptr. 301, 308 (1982) (inquiry by defendant as to whether wife had hired an attorney treated as equivocal request for counsel). We hold that defendant's statement in this case was of a caliber similar to those just quoted, and like them,

constituted an equivocal request for counsel.[15] See also Comment, Equivocal Requests for Counsel; A Balance of Competing Policy Considerations, 55 Cinc. L. Rev. 767, 770-71 (1987) [hereinafter "The Cincinnati Comment"] (categorizing recurring types of equivocal requests for counsel, including as one category "[i]ndecisive statements that indicate uncertainty in the suspect's mind about the need or advisability of obtaining legal representation").

Courts have developed different standards to handle equivocal requests for counsel. The United States Supreme Court identified three methods for handling equivocal requests in Smith v. Illinois, 469 U.S. 91, 95-96 & n.3 (1984), but declined to identify any of them as the constitutionally correct one.

> Some courts have held that all questioning must cease upon any request for or reference to counsel, however equivocal or ambiguous. . . . Others have attempted to define a threshold standard of clarity for such requests, and have held that requests falling below this threshold do not trigger the right to counsel. . . . Still others have adopted a third approach, holding that when an accused makes an equivocal statement that

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[15]"Equivocal request" appears to be an imprecise term in this context. Many of the references to attorneys which are held to be equivocal requests for counsel are not requests at all. It may be preferable to refer to such statements as "equivocal references to an attorney." See, e.g., Note, The Right to Counsel During Custodial Interrogation: Equivocal References to an Attorney, 39 Vand. L. Rev. 1159 (1986) [hereinafter "The Vanderbilt Note"].

> "arguably" can be construed as a request for counsel, all interrogation must immediately cease except for narrow questions designed to "clarify" the earlier statement and the accused's desires respecting counsel.

Id. at 96 n.3 (emphasis added). In Griffin, this court adopted the third approach, holding "that when an accused makes an arguably equivocal request for counsel during custodial interrogation, further questioning must be limited to clarifying the request." 754 P.2d at 969. We remain convinced that this middle approach[16] is preferable to either of the two more extreme positions and note that it is regarded as the majority view. Note, Judicial Approaches to the Ambiguous Request for Counsel, 62 Notre Dame L. Rev. 460, 472 (1987) [hereinafter "The Notre Dame Note"]. It is also favored by commentators as the approach which best balances the interests of law enforcement and the rights of the accused. See, e.g., Note, The Right to Counsel During Custodial Interrogation: Equivocal References to an Attorney, 39 Vand. L. Rev. 1159, 1187-94 (1986); The Notre Dame Note at 472-73; The Cincinnati Comment at 783.

Unfortunately, neither Sgt. Elliot nor Sheriff Hayward attempted to clarify defendant's equivocal reference to an attorney. The transcript of the polygraph examination--and the actual tape is not part of our record--indicates a pause following defendant's equivocal statements about counsel after which Sgt. Elliot stated

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[16]The Vanderbilt Note at 1187 (clarification approach represents "a middle position").

"Okay, if you are not worried about anything I would say that is fine, let's go ahead and proceed." Nothing in this statement by Sgt. Elliot nor any subsequent statement amounts to an effort to clarify defendant's request. Although, as indicated previously, the state did not see fit to brief the "equivocal request for counsel" issues on appeal, it argued below that defendant's subsequent statement that he was "willing to get it over with" was sufficient to clarify his position and to demonstrate a waiver of his right to counsel.[17] We disagree.

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[17]The state also argued below that defendant's signing the written waiver form, on the heels of his "willing to get it over with" comment, clarified that his position was to waive his right to counsel. At least one court has accepted this argument. See State v. Smith, 34 Wash. App. 405, 661 P.2d 1001, 1003 (1983). In Smith, the defendant signed a waiver form subsequent to his equivocal reference to counsel and then proceeded to speak with the officers. Our Washington counterpart found those facts sufficient to demonstrate a waiver on the part of the defendant.

We decline to adopt the Washington position for three reasons. First, we find the position inconsistent with the presumption against waiver. See State v. Fulton, 742 P.2d 1208, 1211 (Utah 1987). Second, we have already noted that once a defendant invokes his right to counsel, statements made in subsequent interrogations, without counsel present and even if pursuant to renewed warnings, must also be suppressed unless defendant initiates the contact. See note 14, supra. If police cannot circumvent the rule through renewed Miranda warnings days after a request for counsel, we see no reason to allow them to do so through a simple waiver form given on the heels of the equivocal reference without any clarification. Finally, other courts have not found a waiver where the defendant has signed a waiver form immediately after an unclarified, equivocal reference to counsel. See, e.g., United States v. Prestigiacomo, 504 F. Supp. 681, 682-84 (E.D.N.Y. 1981) (mem.). Cf. United States v. Fouche, 776 F.2d 1398, 1405 (9th Cir. 1985) ("[T]he police may not use a statement a suspect makes after an equivocal request for counsel, but before the request is clarified, as an

This case is similar to United States v. Prestigiacomo, 504 F. Supp. 681 (E.D.N.Y. 1981) (mem.), and State v. Moulds, 105 Idaho 880, 673 P.2d 1074 (Ct. App. 1983), which were favorably cited by this court in Griffin. In Prestigiacomo, the interrogator did not clarify the defendant's equivocal request for counsel. 504 F. Supp. at 682. Instead, he asked defendant whether he would continue to answer questions. After receiving an affirmative response, he proceeded to interrogate him. Id. The court in that case found the interrogator had given "the impression that what defendant said would not be treated as a sign, albeit an equivocal one, that he wished a lawyer." Id. at 684. That tactic was improper and, consequently, the court suppressed the statements which resulted from further interrogation. Id.

In Moulds, the defendant made an equivocal request for counsel. 673 P.2d at 1083. Instead of clarifying the request, the interrogator recognized defendant's right, informed defendant that the decision was his to make, and then proceeded to discuss the case with defendant. Id. Thereafter, the defendant made incriminating remarks. Id. The Idaho court found that defendant's "statements were

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effective waiver of the right to counsel."). Especially in this case, that approach makes sense. Once defendant made an equivocal reference to counsel, as explained in the text Sgt. Elliot could properly do only one thing--seek clarification. Instead, he concluded that defendant was "not worried," that they should "proceed . . . and get it over with . . . .," and he submitted the written form to defendant for signature. In effect, submission of the written form to defendant was an integral part of Sgt. Elliot's conduct which was at odds with his duty to clarify and as such, the written form cannot be taken as clarifying defendant's equivocal request.

the products of interrogation continued at the instance of the police after the right to counsel had been invoked." Id. at 1085. Consequently, the court affirmed the suppression of the statements. Id.

The fatal flaw in both Prestigiacomo and Moulds was the failure to cease interrogation except for the very limited purpose of clarifying whether defendant wished to assert his right to counsel. The fact that defendant continued to answer questions was not a sufficient indication that he was abandoning his right to counsel. In contrast, Griffin serves as an example of a valid waiver of Miranda rights following clarification of an ambiguous reference to counsel. In Griffin, defendant was advised of his Miranda rights, which he waived. 754 P.2d at 966. However, during the ensuing interview there came a time when he said, "I'm calling an attorney." Id. The interrogating officer immediately asked, "OK, are you saying you don't want to talk anymore?"[18] Id. at 966-67. Defendant's

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[18]The main problem inherent in the clarification approach is "the additional opportunity given to law enforcement officials to . . . [use] clarifying questions to dissuade" suspects from asserting their right to counsel. The Notre Dame Note at 472. See Anderson v. Smith, 751 F.2d 96, 104 n.9 (2nd Cir. 1984); Daniel v. State, 644 P.2d 172, 177 (Wyo. 1982) (permissible for officer to "seek clarification of the suspect's desires, as long as he does not disguise the clarification as a subterfuge for coercion or intimidation"). See also Thompson v. Wainwright, 601 F.2d 768, 771-72 (5th Cir. 1979) (during purported effort to clarify, officer asserted that obtaining counsel may not be in defendant's best interest); Hampel v. State, 706 P.2d 1173, 1182 (Alaska Ct. App. 1985) (during purported effort to clarify, officer emphasized delay and complexity of obtaining an attorney).

One commentator has suggested that only one question should be permitted to seek clarification. With our embellishment in the form

response indicated he would continue to talk to the detective at that time, but planned to talk to an attorney later. Id. at 967. Thus, although the conviction in Griffin was reversed on other grounds, further interrogation following the clarifying exchange just described was held not violative of defendant's Miranda rights.

Defendant's statement in this case included a reference to an attorney which is properly classed as an equivocal request for counsel. Because Sgt. Elliot's warnings were the only Miranda warnings which defendant received before undergoing custodial interrogation, it was necessary that someone clarify that equivocal request before defendant could be subjected to custodial interrogation. Defendant's request was never clarified and, consequently, the state failed to demonstrate a valid waiver of defendant's right to counsel. The trial court erred in holding to the contrary. We accordingly reverse and remand for a new trial.

Because the trial court concluded that defendant's Miranda rights had not been violated, the parties did not have occasion to argue which evidence had to be excluded and whether any exceptions to the exclusionary rule might

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of an introductory statement, that question is as follows: You have been advised of your rights, including the right to have an attorney with you during this even if you cannot afford to hire one. What you just said leads me to wonder whether or not you wish to avail yourself of that right. "Do you want the assistance of [an attorney] at this time or do you agree to answer questions without the presence of [an attorney]?" Comment, Equivocal Requests for Counsel: A Balance of Competing Policy Consideration, 55 Cinc. L. Rev. 767, 782 (1987).

apply.[19] On remand, the parties must of course be allowed to argue these various points. After entertaining these arguments, the trial court must exclude all primary evidence elicited during the custodial interrogation and all incriminating evidence derived therefrom which is not saved by an exception to the exclusionary rule. Miranda v.

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[19]The "independent source doctrine" and "inevitable discovery rule" are among the exceptions to the exclusionary rule. See State v. Northrup, 756 P.2d 1288, 1292-94 (Utah Ct. App. 1988). The state had no occasion to argue either exception, on appeal or below. Consequently, we are unable to determine whether either of these exceptions might apply in this case to some of the evidence which might otherwise have to be suppressed.

"The independent source doctrine allows admission of evidence that has been discovered by means wholly independent of any constitutional violation." Nix v. Williams, 467 U.S. 431, 443 (1984). Thus, any evidence which was discovered apart from defendant's statements made during custodial interrogation need not be excluded.

The inevitable discovery rule allows the admission of evidence as long as "the prosecution can establish by a preponderance of the evidence that the information ultimately or inevitably would have been discovered by lawful means." Id. at 444. See, e.g., People v. Freeman, 739 P.2d 856, 860 (Colo. Ct. App. 1987) (body of deceased victim was so conspicuously located that discovery was inevitable); State v. Miller, 300 Or. 203, 709 P.2d 225, 242-43 (1985) (hotel maid would inevitably have discovered body of deceased victim within 56 hours of actual discovery and reported discovery to police), cert. denied, 475 U.S. 1141 (1986). Under this rule, the prosecution must show that the evidence "would" have been discovered, not simply that it "could" or "might" have been discovered. Miller, 709 P.2d at 242. See also United States v. Romero, 692 F.2d 699, 704 (10th Cir. 1982). It is altogether unclear from the record before us how much, if any, of the evidence discovered as a result of the improper custodial interrogation would inevitably have been discovered.

Arizona, 384 U.S. 436, 479 (1966); Nix v. Williams, 467 U.S. 431, 441 (1984).

Our decision is a difficult one and will be a source of consternation to many, who will question why the state should be put to the cost and burden of having to retry someone who clearly is guilty. But while the results in particular cases may be unwelcome, "[t]he fifth amendment exclusionary rule is clearly dictated by the Constitution and is the only possible means of protecting the values underlying the privilege against self-incrimination." M. Gardner, The Emerging Good Faith Exception to the Miranda Rule--A Critique, 35 Hastings L.J. 429, 466 (1984). We accordingly reverse and remand for proceedings consistent with this opinion.

/s/
Gregory K. Orme, Judge

WE CONCUR:

/s/
Judith M. Billings, Judge

/s/
Pamela T. Greenwood, Judge

APPENDIX B

IN THE UTAH STATE COURT OF APPEALS

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State of Utah,	)	OPINION ON REHEARING
	)	(For Publication)
Plaintiff and Appellee,	)	
	)	
v.	)	Case No. 890327-CA
	)	
Carlos R. Sampson,	)	F I L E D
	)	
Defendant and Appellant.	)	(March 15, 1991)

Third District, Salt Lake County
The Honorable David S. Young

Attorneys: Andrew A. Valdez, Elizabeth A. Bowman, and Richard G. Uday, Salt Lake City, for Appellant
R. Paul Van Dam and Charlene Barlow, Salt Lake City, for Appellee

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Before Judges Billings, Greenwood, and Orme.

ORME, Judge:

This difficult case is again before the court on the state's petition for rehearing. Our prior opinion appears at 143 Utah Adv. Rep. 12 (Utah Ct. App. 1990) and should

be consulted for an understanding of the pertinent facts and our conclusions that defendant was under custodial interrogation when initially given Miranda warnings and that he equivocally invoked his right to counsel.

"NEW" MATTER

In its first brief and oral argument before this court, the state, as to the range of Miranda issues, made a deliberate tactical decision to rely solely on the theory that defendant was not subjected to "custodial interrogation" at the time of the polygraph examination, 143 Utah Adv. Rep at 16, an issue which has now been resolved in defendant's favor. See id. In our initial opinion we regarded this approach by the state as "stop[ping] short of conceding" defendant's arguments concerning his equivocal request for counsel. Id. In its petition for rehearing, the state now argues for the first time that defendant's response to subsequent Miranda warnings[1] adequately served to clarify defendant's equivocal request for counsel or, perhaps more accurately, obviated any need to clarify the request.

While the state's decision not to develop this issue at trial is understandable in light of the state's success there on the argument that defendant had not even equivocally invoked his right to counsel when first given Miranda warnings, see id. at 16, the state should have raised the argument in initial briefing on appeal if it believed this fall-back position had merit. Given the posture of the trial

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[1]In view of the state's prior position, we made only minimal reference to the subsequent warnings in our initial opinion, noting that "the state does not argue the second set of Miranda warnings are of any consequence to our analysis." 143 Utah Adv. Rep. at 20 n.14.

court proceedings, this would not have run afoul of our proscription against raising arguments for the first time on appeal. But in such a situation, consistent with our standing aversion to considering for the first time at some later stage issues that could have been raised at an earlier stage, we ordinarily will not consider arguments presented for the first time on petition for rehearing, and are especially loathe to revisit a decision once rendered when the party seeking reconsideration intentionally did not present us with particular arguments in more timely fashion. See State v. Marshall, 791 P.2d 880, 885-87 (Utah Ct. App.), cert. denied, No. 900238 (Utah, Oct. 23, 1990).

However, we are not unsympathetic to the sheer volume and complexity of issues presented in this case, some ten having been raised by appellant, even though we found it necessary to reach only two in our initial opinion. See Sampson, 143 Utah Adv. Rep. at 14. Even without addressing the issues of whether, assuming custodial interrogation, defendant equivocally invoked his right to counsel and, if he did, whether the subsequent warnings cured the problem, the state's initial brief ran well over our page limit for briefs.

Considering the state's burden when confronted with multiple issues of the magnitude presented here, in conjunction with the significance of the waiver issue, and in light of helpful authority from the United States Supreme Court which was not available at the time of initial argument, we grant the state's petition for rehearing and proceed to treat its claim that the subsequent Miranda warnings and defendant's response thereto served to clarify his prior equivocal request for counsel or at least rendered

it inconsequential as to the incriminating statements he made after getting new Miranda warnings.[2]

SUBSEQUENT MIRANDA WARNINGS AS CLARIFYING EQUIVOCAL REQUEST

The state concedes for purposes of our further review that Sergeant Elliot erred in failing to follow firmly established precedent by not clarifying defendant's equivocal reference to counsel when defendant was first given the Miranda warnings. However, the state argues that a subsequent set of warnings, subsequent waiver by defendant, and information gleaned from the subsequent interrogation purged the taint of illegality introduced by the earlier disregard of defendant's equivocal request for counsel. The state calls our attention to Oregon v. Elstad, 470 U.S. 298 (1985), and claims we improperly relied on Edwards v. Arizona, 451 U.S 477 (1981). See Sampson, 143 Utah Adv. Rep. at 20 n.14. The state focuses particularly on an ambiguous footnote in Edwards. See 451 U.S. at 486 n.9.

In Elstad, the United States Supreme Court held that a defendant's subsequent statement, given after an initial statement made without the benefit of Miranda warnings, may be admissible when Miranda warnings preceded the subsequent statement and there were no improper or

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[2]We note that these circumstances are unique and hasten to caution that the complexity of issues, the length of briefs, or a tactical choice to initially avoid issues on appeal will normally not suffice to induce us to consider issues raised for the first time on a request to reconsider a decision already made.

coercive tactics employed by police in connection with the initial statement. Elstad, 470 U.S. at 314. The Court's rationale was that Miranda's protective measures, not the Fifth Amendment itself, were violated in such a case, making suppression of the later statements unnecessary. Elstad, 470 U.S. at 308.

On the other hand, in Edwards the Court emphasized that, unless an accused initiates the encounter, police cannot re-administer Miranda warnings and renew interrogation once a defendant has "clearly asserted" his or her right to counsel on an earlier occasion when Miranda warnings were actually given. Edwards, 451 U.S. at 484-85.

The state invites us to focus total attention on the "clearly asserted" language in Edwards, and hold that Edwards is accordingly inapplicable. The state would have us instead employ the Elstad rationale, because defendant did not clearly assert his right to counsel in this case, and determine whether the Fifth Amendment itself was violated. In essence, the state asserts we must find that defendant effectively waived his right to counsel when he was given new Miranda warnings and said nothing about counsel since the failure to clarify the equivocal request for counsel was "only" a violation of the Miranda doctrine, not a violation of the Fifth Amendment.

We recognize that waiver of constitutional rights is "possible . . . when the request for counsel is equivocal." Edwards, 451 U.S. at 486 n.9. But we are hard-pressed to see how an equivocal request for counsel can be meaningfully waived in advance of its having ever been clarified.

"The merit of the Edwards decision lies in the clarity of its command and the certainty of its application." Minnick v. Mississippi, 111 S.Ct. 486, 490 (1990). A defendant who requests counsel "is not subject to further interrogation by the [police] until counsel has been made available to him . . . . " Edwards, 451 U.S. at 485. The Edwards decision leaves no room for ambiguity or uncertainty in the context of a clear invocation of the right to counsel. The singular event which may occur upon a defendant's request for counsel is for the defendant to consult with counsel.[3] Neither the passage of time, however great, nor the administration of additional Miranda warnings will allow officers to begin interrogation anew unless the suspect has been given the chance to consult with an attorney.

Obviously, the instant case does not fit squarely into either the Elstad or the Edwards framework. Unlike in Elstad, Miranda warnings were given to Sampson at the outset; unlike in Edwards, Sampson's request for counsel was not unequivocal. But we think the equivocal request for counsel situation is conceptually and practically more analogous to a clear request for counsel, as in Edwards and Minnick, than it is to a wholly unwarned statement as in Elstad. By analogy to the point made in the preceding

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[3]The Edwards Court did not foreclose the possibility of waiver of the right to counsel when a defendant, once having invoked the right, freely initiates further conversation with officers even though the defendant has not consulted counsel. See 451 U.S. at 484-85. See also United States v. De La Luz Gallegos, 738 F.2d 378, 381 (10th Cir.) (where attorney is requested but not yet provided, Edwards does not preclude introduction of voluntary statements not made as a result of police questioning), cert. denied, 369 U.S. 1076 (1984).

paragraph regarding a clear request for counsel, it would appear that the singular event which may occur upon a defendant's equivocal reference to counsel is for defendant's "request" to be clarified. See Sampson, 143 Utah Adv. Rep. at 20 n.17 ("Once defendant made an equivocal reference to counsel . . . Sgt. Elliot could properly do only one thing--seek clarification."). Neither the passage of time, however great, nor the administration of additional Miranda warnings will allow officers to reconvene interrogation absent clarification. If a signed waiver executed immediately after the equivocal request for counsel will not be taken as adequate clarification, see Sampson, 143 Utah Adv. Rep. at 20 n.17, there is no reason why a waiver later in time should be recognized as such. Simply put, we believe that an equivocal request for counsel must be treated by the police and analyzed by the courts as though it were an unambiguous request for counsel--until such time as it has been properly clarified and shown to be otherwise.[4]

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[4]The concern which explains our view is, in large part, this: In the course of properly clarifying an equivocal request, the sanctity of an accused's right to counsel will be brought home for the accused. See Sampson, 143 Utah Adv. Rep. at 20 n.18. If instead an equivocal request is ignored, and the timid or ignorant suspect's halting effort to explore the advisability of seeking counsel is apparently for naught, the suspect may perceive he is being discouraged from availing himself of the right to counsel. Someone in defendant's shoes who simply gets a new set of Miranda warnings with no acknowledgement of his prior reference to counsel may think: "I wondered before if I should have a lawyer. My question was ignored. There's no sense in raising it again."

VIOLATION OF MIRANDA VS. VIOLATION OF FIFTH AMENDMENT

The state urges that the subsequent confession and derivative evidence were properly admitted under Elstad, claiming the failure to clarify defendant's equivocal request for counsel, although a violation of Miranda, was not violative of the Fifth Amendment itself. In advancing its Elstad argument, the state principally relies on Martin v. Wainwright, 770 F.2d 918 (11th Cir. 1985), cert. denied, 479 U.S. 909 (1986)[5]. In Martin, the suspect was given

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[5]The state has cited other cases to similar effect in its petition and at oral argument. E.g., United States v. Gonzalez-Sandoval, 894 F.2d 1043 (9th Cir. 1990); United States v. Barte, 868 F.2d 773 (5th Cir.), cert. denied, 110 S.Ct. 547 (1989); Elledge v. Dugger, 823 F.2d 1439 (11th Cir. 1987); United States v. Patterson, 812 F.2d 1188 (9th Cir. 1987), cert. denied, 485 U.S. 922 (1988); Thompson v. Wainwright, 601 F.2d 768 (5th Cir. 1979); United States ex rel. Hudson v. Cannon, 529 F.2d 890 (7th Cir. 1976). Even if they were otherwise persuasive, the cases cited by the state are readily distinguishable in that no case involves two sets of Miranda warnings--the first followed by an equivocal request for counsel and the second followed by apparent waiver--as is the case before us. The cases, with the exception of Martin which we treat more fully in the text, instead involve some variation on the Elstad theme--statements made without Miranda warnings, followed by Miranda warnings, waiver, and further statements.

The state additionally cites, in a letter submitted after argument on the petition for rehearing, State v. Christofferson, 793 P.2d 944 (Utah Ct. App. 1990), claiming that this court there "held that [a] second set [of warnings] served as a clarification of the equivocal request." We do not read Christofferson this way. The police officers in Christofferson apparently ceased questioning after the equivocal request for counsel, and proceeded to clarify the defendant's equivocal request. Once they did so and learned that the defendant did not desire counsel, the

his Miranda warnings. In the course of interrogation, he asked: "Can't we wait until tomorrow?" Martin, 770 F.2d at 922-23. The Eleventh Circuit held this question was an equivocal request to terminate questioning and to invoke the right to remain silent, at least temporarily. It is notable that the court did not find the question to be an equivocal request for counsel, although it determined that an equivocal request to terminate questioning should be treated analogously to an equivocal request for counsel. Martin, 770 F.2d at 924.

The court held that the defendant's first confession, given subsequent to his equivocal request to remain silent which was not honored, was inadmissible as violative of Miranda. Martin, 770 F.2d at 924. The court stated that the failure to terminate questioning pending clarification, like the failure to give Miranda warnings in the Elstad context, violates the technical requirements of the Miranda rule although it does not violate the Fifth Amendment. Id. at 928-29. But because the first confession was not coerced, the court upheld admission of a second confession, given several days later and on the heels of renewed Miranda warnings, and after the defendant had consulted with counsel. Id. at 929.

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officers continued interrogation. Id. at 947. We hesitate to read the decision as equating a mere second administration of Miranda warnings, even if no Miranda rights were then invoked, with definitive clarification of an equivocal request for counsel. Such an important and far-reaching conclusion would surely have been accompanied by lengthy discussion and analysis, which is not to be found in the opinion, and is at odds with language in the opinion noting that clarifying questions were asked prior to proceeding with a second set of warnings and further interrogation. See id.

The state asks us to treat the failure to clarify defendant's equivocal request for counsel in this case in similar fashion to Martin and to determine that it was merely a technical violation of the Miranda rule, and therefore does not bar introduction of defendant's subsequent confession made after new Miranda warnings were given. In urging this analogy, the state slights the continued vitality and invigoration given Edwards v. Arizona in subsequent Supreme Court decisions, including the recent decisions in Minnick v. Mississippi, 111 S.Ct. 486 (1990) and Arizona v. Roberson, 486 U.S. 675 (1988). Moreover, such an analysis is inapposite given our determination that an equivocal reference to counsel should be, until properly clarified, treated on equal footing with an unambiguous request to speak to an attorney.[6]

A rigid insistence on clarification of the equivocal request for counsel if interrogation is to continue requires just that--clarification. State v. Griffin, 754 P.2d 965, 969 (Utah Ct. App. 1988). An equivocal request is simply not clarified by being ignored by the police. Clarification necessarily implies that the equivocal request must be acknowledged by the interrogator. The interrogator must ask something like: "Your response suggests that you may wish to consult with an attorney before answering any of

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[6]The state's proffered analysis is further flawed in that the bright-line rule of Edwards, cited in Minnick v. Mississippi for "clarity of its command" and "certainty of its application," 111 S.Ct. at 490, would be undermined if courts were required to receive evidence pertaining to the lack of coercion attending an equivocal voluntariness of waiver of the request for counsel. In addition to breeding contempt for a cherished constitutional right, significant judicial resources would be needlessly expended, a result clearly eschewed in Edwards and its progeny.

my questions. Do you wish to speak with an attorney or do you wish to answer my questions now?" Sampson, 143 Utah Adv. Rep. at 17.

For all practical purposes, as we have held above, until such time as the equivocal reference to counsel is clarified as not being an actual request for counsel, it must be treated the same as an express and unambiguous request for counsel. Cf. Griffin, 754 P.2d at 969 ("[W]hen an accused makes an arguably equivocal request for counsel during custodial interrogation, further questioning must be limited to clarifying the request.") The question then becomes whether the Constitution, or only Miranda, is violated if police disregard an invocation of the right to counsel and obtain a confession.

The answer is clear. Edwards and its progeny teach that once the right to counsel has been invoked "subsequent incriminating statements made without [the defendant's] attorney present [violate] the rights secured to the defendant by the Fifth and Fourteenth Amendments to the United States Constitution.[7] Oregon v. Bradshaw, 462 U.S. 1039, 1043 (1983) (emphasis added); See Shea v. Louisiana, 470 U.S 51, 52 (1985) (interrogation subsequent to a request for counsel violates Fifth and Fourteenth Amendments). See also Minnick, 111 S.Ct. at 489 (valid waiver cannot be established by showing that defendant responded to further questions).

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[7]Insofar as Martin's view of an analogy between an equivocal invocation of the right to remain silent and an equivocal request for counsel might suggest otherwise, we reject that view. Cf. Roberson, 486 U.S. at 683 (emphasizing distinction between exercise of right to terminate interrogation and remain silent and right to counsel).

In Roberson, the Court stated: "Surely there is nothing ambiguous about the requirement that after a person in custody has expressed his desire [for] counsel, he 'is not subject to further interrogation . . . until counsel has been made available to him . . . .'" 486 U.S. at 685-86 (quoting Edwards, 451 U.S. at 484-85). Given our view that an equivocal request must be treated like a clear request pending clarification, failure to clarify an equivocal request, and interrogation conducted after that request, clearly do not fall within the rubric of a "mere technical violation" as suggested by the state.

The United States Supreme Court has demonstrated no crypticism or ambivalence in holding violations of the right to counsel during interrogation to be constitutional in nature. See Minnick, 111 S.Ct. at 491 ("Whatever the ambiguities of our earlier cases on this point, we now hold that when counsel is requested, interrogation must cease, and officials may not reinitiate interrogation without counsel present . . . ."); Roberson, 486 U.S. at 683 (emphasizing distinction between exercise of right to terminate interrogation and remain silent and right to counsel).

We therefore decline to adopt a rule which would relegate failure to clarify an equivocal request for counsel to the status of "mere" Miranda violation for Elstad purposes.[8]

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[8]The state also argues that even if defendant's statements must be suppressed, the derivative physical evidence, chiefly the victim's body, would be properly admitted, presumably by way of photographs and descriptive testimony. The state proceeds upon the assumption that the interrogation subsequent to defendant's equivocal reference to counsel, concededly a violation of the Miranda rule, was merely technically defective, not constitutionally infirm. The state calls our attention to

CONCLUSION

The subsequent Miranda warnings given to defendant did not serve to clarify his prior equivocal request for counsel or somehow make that request go away. The violation was constitutional in magnitude. Accordingly,

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several decisions in which other courts have allowed the admission of derivative evidence obtained subsequent to interrogation conducted in violation of the technical rules of Miranda. See, e.g., United States v. Patterson, 812 F.2d 1188 (9th Cir. 1987), cert. denied, 485 U.S. 922 (1988); In re Owen F., 70 Md. App. 678, 523 A.2d 627, cert. denied, 310 Md. 275, 528 A.2d 1286 (1987); State v. Wethered, 110 Wash. 2d 466, 755 P.2d 797 (1988). We find the cases cited by the state to be inapplicable, as each addresses violations of the Miranda rule which are not deemed constitutional in dimension. We have already held in evaluating the state's Elstad argument that the violation of defendant's right to counsel was of constitutional dimension and not merely a violation of Miranda.

Evidence obtained in violation of the Fifth Amendment is properly suppressed under the fruit of the poisonous tree doctrine. Sampson, 143 Utah Adv. Rep. at 18. See, e.g., Shea v. Louisiana, 470 U.S. 51, 52 (1985) (interrogation subsequent to request for counsel violates Fifth Amendment). See also Nix v. Williams, 467 U.S. 431, 442 & n.3 (1984). While we are not ignorant of the obstacles which the state will face in presenting a case on remand without evidence of the body absent the applicability of some exception to the exclusionary rule, see Sampson, 143 Utah Adv. Rep. at 18 & n.19, the derivative evidence of the child's body was obtained as a direct result of interrogation that was improper as a matter of constitutional law, and must, absent some exception, be suppressed. We are not enthusiastic about the obstacles our decision will create to securing defendant's conviction on retrial. But we are unwilling to sidestep important constitutional safeguards to assuage the frustrations that inhere in retrying a defendant clearly guilty of such a heinous crime. See Nix v. Williams, 467 U.S. at 442.

testimonial and physical evidence derived from all ensuing interrogation must be suppressed.

Having reheard and reconsidered the matter, our initial opinion stands as supplemented herein.

/s/_____
Gregory K. Orme, Judge

WE CONCUR:

/s/_____
Judith M. Billings, Judge

/s/_____
Pamela T. Greenwood, Judge

91-1072 (2)

No. _____

In the

Supreme Court of the United States

October Term, 1991

STATE OF UTAH

Petitioner,

v.

CARLOS REINALDO SAMPSON

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE STATE OF UTAH

BRIEF OF AMICUS CURIAE IN SUPPORT OF PETITIONER

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QUESTIONS PRESENTED

1. What effect should the administration of a polygraph examination have on the issue of custody for *Miranda* purposes?

2. What effect should be given an ambiguous reference to counsel in response to *Miranda* warnings given to a person not in custody?

3. What effect should be given to an ambiguous reference to counsel in response to *Miranda* warnings generally?

4. Should derivative physical evidence obtained from an alleged violation of *Miranda* be admissible?

This amicus brief addresses questions 2 and 3.

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INTEREST OF AMICUS CURIAE

The States joined herein as amicus curiae urge this Court to grant certiorari and quash the decision of the Court of Appeals for the State of Utah. The state court reversed Respondent Sampson's murder conviction on a finding that police violated his *Miranda* rights when they failed to clarify his equivocal reference to counsel.

This case, as well as numerous other state and federal court decisions, show the need for this Court to examine whether the rigid procedural requirements which have developed from the 25-year-old *Miranda* decision continue to provide a viable means for determining the admissibility of confessions, to the exclusion of all other factors relevant to voluntariness under a due process analysis, or whether, under the special circumstances presented in this case, *Miranda*'s auxiliary provisions might better be incorporated as one of a number of nondeterminative factors in a totality of circumstances test.

ARGUMENT

In the decision at bar, the Utah Court of Appeals reversed respondent's criminal homicide conviction on the ground that incriminating statements were obtained in violation of his *Miranda*[1] right to counsel. The court held that respondent's statement, "Well, uh, should I have a lawyer, I mean, well, I'm really not worried about anything, it is just that...." was an equivocal reference to counsel which police failed to clarify. Because of the failure to clarify the reference, the court held that respondent's confessions, and physical evidence obtained as a result of the confessions, were required to be excluded.

The states joined herein believe that this case presents a compelling opportunity for this court to review the continuing scope and viability of its *Miranda* decision, and to evaluate whether, when good faith police efforts to comply with *Miranda* procedures result in a technical violation of the rules, or a failure to fully adhere to the dictates of *Miranda,* the admissibility of confessions should be determined under a more flexible totality of circumstances test, rather than rigid adherence to *Miranda* procedures.

This court devised the prophylactic *Miranda* rules to combat the compelling pressures of in custody interrogation and to permit a full opportunity for a defendant to exercise the Fifth Amendment privilege against self-incrimination. The decision was issued prior to the widespread recognition by police or prosecutors that prophylactic warnings would not necessarily eliminate confessions and that such warnings, and waivers, were valuable evidence of voluntariness. While the court sought to protect the privilege against compulsory self-incrimination, its ultimate concern was to prohibit the admission of statements which were the product of police overreaching. *See Colorado v. Connelly,* 479

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1 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed. 2d 694 (1966).

U.S. 157,170, 107 S.Ct. 515, 93 L.Ed. 2d 473,486 (1986) ("The sole concern of the Fifth Amendment, on which *Miranda* was based, is governmental coercion."). In devising the procedures for apprising defendants of their Fifth Amendment rights and securing valid waivers of those rights, the court sought to educate police and prosecutors as to the constitutional boundaries for obtaining statements from defendants, to simplify judicial determinations as to the admissibility of custodial statements, and to provide each citizen with a shorthand accounting of his federal constitutional rights during custodial interrogations. The court has repeatedly recognized that *Miranda*'s prophylactic rules are not themselves constitutionally mandated, but are only measures to protect the right against compulsory self-incrimination. *See Michigan v. Tucker,* 417 U.S. 433,444, 94 S.Ct. 2357, 41 L.Ed. 2d 182, 192.

Prior to *Miranda,* the principal concern in the context of compelled disclosures was simply whether such statements were voluntary under a totality of circumstances test. The court in state cases applied a due process test which examined the circumstances of interrogation to determine whether the processes were so unfair or unreasonable as to render subsequent confessions involuntary, and in federal cases referenced both the privilege against compulsory self-incrimination, *Bram v. United States,* 168 U.S. 532, 18 S.Ct. 183, 42 L.Ed. 568 (1897), and due process concerns. *Haynes v. Washington,* 373 U.S. 503, 83 S.Ct. 1336, 10 L.Ed. 2d 513 (1963).

No evidence of police overreaching was present in this case. Yet, respondent's equivocal reference to counsel, deemed insufficiently clarified by his immediately subsequent statement, "I'm willing to get it over with," and his written waiver of his *Miranda* rights, resulted in exclusion not only of his first confession, but also of derivative physical evidence, and a second confession given after subsequent

Miranda warnings. Unjustifiably, this result illogically elevates *Miranda*'s procedural safeguards above the constitutional protections afforded by the Fifth Amendment. This court moreover has never stated same. As aptly demonstrated by the Utah state court's almost impossibly complex analysis of the myriad *Miranda* issues presented by this case, the expanded *Miranda* test, as applied under the circumstances here, is more complex than the due process voluntariness test and may well produce an answer inconsistent with the constitutional test of voluntariness. In other words, the test as applied here does not serve simplicity, certainty, accuracy, or efficiency.

Two recent Florida cases vividly illustrate this point.

In *Owen v. State,* 560 So.2d 207 (Fla. 1990), *cert. denied,* ___ U.S. ___, 111 S.Ct. 152, 112 L.Ed. 2d 118 (1990), the Florida Supreme Court rejected Owen's claims of police coercion after viewing videotapes of his confessions which conclusively demonstrated that he was repeatedly advised of and understood his *Miranda* rights, was provided food and refreshments and was not subjected to individually lengthy interrogation sessions. There was, in short, a complete absence of state coercion. Yet, the court reversed Owen's convictions for murder, sexual battery and burglary because police failed to clarify his response to an inquiry about an insignificant detail,[2] "I'd rather not talk about it." While finding no violation of Owen's Fifth Amendment rights, the court nevertheless concluded that the failure of police to clarify an equivocal reference to Owen's *Miranda* right to terminate questioning required exclusion of his confessions.

In *Towne v. Dugger,* 899 F. 2d 1104 (11th Cir. 1990), *cert. denied,* ___ U.S. ___, 111 S.Ct. 536, 112 L. Ed. 2d 546 (1990),

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2 Police asked Owen where he had left his bicycle. *Owen,* 560 So.2d at 215.

the Eleventh Circuit Court of Appeals in a habeas proceeding rejected Towne's claim that his confessions were involuntarily obtained, but held they were required to be excluded under *Edwards v. Arizona,* 451 U.S. 477, 101 S.Ct. 1880, 68 L.Ed. 2d 378 (1981) because police did not clarify Towne's statement, "what do you think about whether I should get a lawyer." This miscarriage of justice occurred in a federal habeas proceeding years after the *Miranda* claim had been rejected by state courts and a federal district court.

This court has distinguished between mere technical departures from *Miranda* rules, and conduct which constitutes violations of the Fifth Amendment itself. *See Duckworth v. Eagan,* 492 U.S. 195, 109 S.Ct. 2875, 106 L.Ed. 2d 166 (1989); *New York v. Quarles,* 467 U.S. 649, 104 S.Ct. 2626, 81 L.Ed. 2d 550, (1984); *Michigan v. Tucker,* 417 U.S. 433, 94 S.Ct. 2357, 41 L.Ed. 2d 182 (1974). Justice O'Connor in her concurring opinion in *Duckworth v. Eagan* noted that the *Miranda* rule, like all prophylactic rules, "overprotects" the Fifth Amendment "[i]n the name of efficient judicial administration of the Fifth Amendment guarantee and the need to create institutional respect for Fifth Amendment values." *Id.,* 492 U.S. at ___, 106 L.Ed. 2d at 181.

However, *Miranda*'s value as an efficient means to simplify and clarify voluntariness determinations, as well as to create institutional respect for Fifth Amendment rights, is utterly lost in cases such as *Towne, Owen,* and the case *sub judice.* Despite police good faith advisements and unchallenged waivers of *Miranda* rights, the inadvertent failure of police to clarify ambiguous references to the right to remain silent or to counsel has been elevated above the constitutional rights sought to be protected. *Miranda* procedures must be subservient to the constitutional rights they serve, rather than elevated above these rights. The application of *Miranda* rules in this case, in *Owen* and in *Towne* resulted in esoteric legal analyses far more complex

and less clarifying than the due process totality of circumstances test which preceded *Miranda,* and totally remote from the ultimate issue of coercion with which both *Miranda* and the due process test are concerned. When technical violations or oversights of *Miranda* occur in the presence of otherwise good faith police efforts to comply with *Miranda* procedures, the admissibility of confessions should turn on their voluntariness, not whether a breach in procedure occurred.

The states joined herein do not propose a retreat from the requirement that *Miranda* warnings be given, and valid waivers of *Miranda* rights be secured prior to the obtaining of custodial statements. Even if this court were to recede entirely from *Miranda,* police would be well-advised to continue such practices in order to develop evidence of voluntariness in the manner originally intended by *Miranda.* What is being suggested is that *Miranda* no longer be the point from which no one may return. This court has certainly not disallowed, for example, a harmless error analysis in *Miranda* cases or in coerced confession cases. *Arizona v. Fulminante,* ___U.S. ___, 111 S.Ct. 1246, 113 L.Ed. 2d 302 (1991).

In light of the above, the states joined herein as amicus urge this Court to grant certiorari so that the scope of *Miranda* may be reexamined under the circumstances presented in this case.

CONCLUSION

The States joined herein as amicus curiae urge this Honorable Court to grant the petition for writ of certiorari filed on behalf of the State of Utah.

Respectfully submitted,

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No. _____

In the

Supreme Court of the United States

October Term, 1991

STATE OF UTAH

Petitioner,

v.

CARLOS REINALDO SAMPSON

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE STATE OF UTAH

BRIEF OF AMICUS CURIAE IN SUPPORT OF PETITIONER

APPENDIX

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EDITOR'S NOTE

THE FOLLOWING PAGES WERE POOR HARD COPY AT THE TIME OF FILMING. IF AND WHEN A BETTER COPY CAN BE OBTAINED, A NEW FICHE WILL BE ISSUED.

No. 91-1072

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1991

STATE OF UTAH, Petitioner,

v.

CARLOS REINALDO SAMPSON, Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UTAH COURT OF APPEALS

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Did the Utah Court of Appeals properly conclude that Mr. Sampson's fifth amendment rights against self-incrimination were violated when police officers failed to clarify his equivocal request for counsel while undergoing custodial interrogation?

2. Is the exclusionary rule properly applied to the circumstances of the police misconduct in this case as decided by the Utah Court of Appeals?

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No. 91-1072

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1991

STATE OF UTAH, Petitioner,

v.

CARLOS REINALDO SAMPSON, Respondent.

Respondent Carlos Reinaldo Sampson respectfully requests that this Court deny the State of Utah's Petition for Writ of Certiorari seeking review of the Utah Court of Appeals' opinion in State of Utah v. Sampson, 808 P.2d 1100 (Utah Ct. App. 1991), cert. denied, 817 P.2d 327 (Utah 1991). See Appendix for copy of opinion.

STATEMENT OF THE CASE

Carlos Reinaldo Sampson's intellectual abilities are minimal. Carlos contracted Spinal Meningitis, described as "a serious infection of the brain that can cause brain damage," at the age of seven months; he is borderline mentally retarded. See trial transcript at page 75 and sentencing transcript 2 at pages 8-9. With great difficulty and family sacrifice, he managed to graduate from high school through special education classes. Trial transcript at pages 691, 701 and 725-26. At the time of this incident, Carlos was twenty-six years old; he has no prior convictions.

For purposes of this Objection to the State of Utah's Petition for Writ of Certiorari, Mr. Sampson adopts the statement of the case as contained within the opinion of the Utah Court of Appeals as more complete and accurate than that espoused by the State of Utah. Exceptions to various factual claims or omissions made by Petitioner will be noted during argument of the respective points.

REASONS FOR DENYING THE WRIT

In its petition to this Court, the State of Utah identifies four questions for review. State's petition at (i). As indicated in the opinion of the Utah Court of Appeals, the State of Utah has waivered in its positions on these questions.

At trial, the State of Utah raised but did not dwell on the issue of custodial interrogation, opting instead to argue that Mr. Sampson did not invoke, equivocally or otherwise, his right to counsel. Sampson, 808 P.2d at 1104, 1108.

On direct appeal to the Utah Court of Appeals, the State of Utah chose to focus on the custodial interrogation issue virtually ignoring, although stopping short of conceding, the equivocal request for counsel issue. Id. at 1110.

Also on direct appeal, the State of Utah did not raise any question regarding the effect, if any, of a second set of Miranda warnings given to Mr. Sampson. Id. at 1108 n.14. After the Court of Appeals reversed the conviction of Mr. Sampson, however, the State took issue with the opinion's footnote fourteen and

presented for the first time the issue that the subsequent warnings either clarified the equivocal request for counsel or obviated any need to clarify the request. Id. at 1112.[1] The Utah Court of Appeals permitted rehearing, requesting briefing and argument on the new issue. Id.

The Court of Appeals rejected the argument, Id. at 1114, and the Utah Supreme Court denied the State of Utah's petition for certiorari filed in that court. State v. Sampson, 817 P.2d 327 (Utah 1991).

Consistent throughout the State of Utah's arguments, and demonstrated again in this Court, is the State's failure to recognize that the trial court necessarily found custodial interrogation as a threshold requirement when it denied Mr. Sampson's Motion to Suppress on the grounds that he had been informed of his rights, understood them and voluntarily waived them. Additionally, the State of Utah has been and remains unable and/or unwilling to recognize important distinctions announced by this Court between Miranda violations and fifth amendment violations, and between right to silence cases and right to counsel cases.

Mr. Sampson responds to the State of Utah's arguments by illustrating the correctness of the Utah Court of Appeals' opinion

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1. Notably, Mr. Sampson had indicated from his Motion to Suppress on through direct appeal that the subsequent warnings were inconsequential because the equivocal request for counsel had never been clarified nor counsel provided and that police, not he, initiated the subsequent discussions.

and the appropriateness of the Utah Supreme Court's refusal to review the decision.

I. THE UTAH COURT OF APPEALS CORRECTLY HELD THAT MR. SAMPSON'S FIFTH AMENDMENT RIGHTS AGAINST SELF-INCRIMINATION WERE VIOLATED WHEN POLICE OFFICERS FAILED TO CLARIFY HIS EQUIVOCAL REQUEST FOR COUNSEL WHILE UNDERGOING CUSTODIAL INTERROGATION.

A. REASONS FOR DENYING STATE'S PETITION ON POINT I

The State of Utah requests this Court in its point I to resolve whether a polygraph examination is itself a custodial interrogation requiring Miranda warnings. That request is inappropriate because the Utah Court of Appeals did not indicate that a polygraph examination resolved the issue of custodial interrogation. The fact Mr. Sampson took a polygraph examination is only one of a totality of circumstances which demonstrated custodial interrogation. The Court of Appeals decided that the trial court examined and necessarily found custodial interrogation to have existed anticipatory to its "conclud[ing] that defendant was informed of his rights, understood his rights, and voluntarily waived them--conclusions which would be irrelevant if the court thought there had been no custodial interrogation." Sampson, 808 P.2d at 1104. The appellate court's analysis, consistent with its obligation to review for correctness, assured as accurate the trial court's conclusions of law. Id. at 1103-04 (citing, inter alia, Diversified Equities, Inc. v. American Savings & Loan Assoc., 739

P.2d 1133, 1136 (Utah Ct. App. 1987); and Scharf v. BMG Corp., 700 P.2d 1068, 1070 (Utah 1985)).

The Utah Court of Appeals reserved reaching the question the State now poses to this Court; the appellate opinion, however, leaves no doubt it resolved the custodial interrogation question in favor of Mr. Sampson, as had the trial court. Id. at 1107-08 ("unless we find that defendant's Miranda rights were adequately protected by reason of the exchange at the outset of the polygraph examination undertaken by Sgt. Elliot, there was no adequate 'Mirandizing' of defendant before he gave his custodial confession") and at 1112 ("the State, as to the range of Miranda issues, made a deliberate tactical decision to rely solely on the theory that defendant was not subjected to 'custodial interrogation' at the time of the polygraph examination, . . . an issue which has now been resolved in defendant's favor"). In passing on the appropriateness of the conclusion of custodial interrogation, the Court of Appeals painstakingly reviewed decisions of this Court and the Utah Supreme Court to establish the correctness of the conclusion below. Id. at 1104-08 (citing, inter alia, Berkemer v. McCarty, 468 U.S. 420 (1984); State v. Kelly, 718 P.2d 385 (Utah 1986); and Salt Lake City v. Carner, 664 P.2d 1168 (Utah 1983)).

Contrary to the State of Utah's assertion that the Court of Appeals had only the fact that Mr. Sampson took a polygraph examination to enable a finding of custodial interrogation (Petition of State of Utah at page 9), the court looked at the totality of circumstances, only one of which was the polygraph examination. The

court identified five factors to be balanced and analyzed numerous other facts to support the correctness of the conclusion of custodial interrogation. Sampson, 808 P.2d at 1105 (citing, Salt Lake City v. Carner, 664 P.2d at 1171; and State v. Herrera, 49 Or. App. 1075, 621 P.2d 1209 (1980)).

The Utah Court of Appeals articulated two factors, numbers 2 and 4, the focus of the investigation (i.e., State conceded Mr. Sampson was the only suspect prior to instructing him to take polygraph) and the form of the interrogation (i.e., accusatory nature of polygraph questions), as the most heavily weighted in favor of determining custody. Sampson, 808 P.2d at 1105. The fact that Mr. Sampson was taking a polygraph examination factored into the court's balancing, but it was not the only, nor the most compelling circumstance in that analysis. Id.

Included in the appellate court's determination of custody were the following articulated facts: the site of the interrogation was the police station; Mr. Sampson was restrained, albeit limitedly, by the connections to the polygraph machine; he was the focus of the investigation and under suspicion for murder and/or kidnapping; he had not been instructed that he was free to go; and, the questioning during and after the examination was accusatory in nature. Id. at 1105-06.

Other facts present in the record and before the court were as follows: Mr. Sampson was "instructed" not invited to return to the police station for a polygraph test; Sgt. Elliot told Mr. Sampson at least two times that there were two things "that we

needed to show" or "accomplish" before they "walk[ed] out of here"; the examination occurred in a so-called interrogation room eight feet by ten feet in size containing one desk and two chairs, a tape recorder and the polygraph equipment; the interrogation room was just off the main squad room with approximately twenty to twenty-five officers working there at the time of the interrogation; Sgt. Elliot read Mr. Sampson his Miranda rights informing him he was in the "cop shop"; from his arrival at the station, Mr. Sampson was never left alone; suspicion existed that Mr. Sampson had injured or killed the child; Sgt. Elliot indicated he did not know whether Mr. Sampson was free to go once he arrived for the examination inasmuch as he was aware Mr. Sampson was the only suspect; and, Sheriff Hayward conceded that he possibly would not have let Mr. Sampson leave had he so desired. See Opening Brief and Reply Brief of Mr. Sampson and citations to record therein, pages 18-20 and 5-9, respectively.

These enumerated factors from the record and from the opinion support that under a totality of the circumstances, Mr. Sampson was in custody and being interrogated from the inception of the reading of the Miranda warnings by Sgt. Elliot. Accordingly, the Petitioner's position is without merit, and this Court should not grant the State of Utah's petition pursuant to its point I.

B. REASONS FOR DENYING STATE'S PETITION ON POINT II

Neither should this Court grant the State of Utah's petition on point II. In point II, Petitioner is asking this Court to rule on an issue of purported gratuitous Miranda warnings without the Utah Court of Appeals having indicated the warnings were in any way gratuitous. Several reasons exist why this Court should not consider the Petitioner's request for this Court to determine what effect should be given to an equivocal request for counsel following gratuitous Miranda warnings. First, the Miranda warnings were not gratuitously given to Mr. Sampson As indicated above, the Utah Court of Appeals' decision affirmed that portion of the trial court's conclusions indicating, by necessity, that Mr. Sampson was in custody and being interrogated at the inception of the polygraph. By finding that Mr. Sampson equivocally invoked the right to counsel at the inception of the polygraph when he responded to the warnings of Sgt. Elliot, the Court of Appeals has decided those warnings were significantly, not gratuitously, given. Once warned of his right to counsel, Mr. Sampson could not then be unwarned of that right.

The second reason this Court should not grant Petitioner's point II is because the State of Utah is raising the question of gratuitous warnings for the first time before this Court, having failed to raise the claim before the Utah Court of Appeals, including even on rehearing when the potential issue was purportedly revealed in the initial opinion of the court. This

Court has long held that it will not review for the first time on petition for writ of certiorari a claim not properly raised below and addressed by the lower court. Delta Airlines v. August, 450 U.S. 346, 362 (1981) (question presented in petition but not to court of appeals is not properly before us). See, also, United States v. Mendenhall, 446 U.S. 544, 551-52 n.5 (1980); Adickes v. Kress & Co., 398 U.S. 144, 147 n.2 (1970); and Youakim v. Miller, 425 U.S. 231, 234 (1976).

The third reason for this Court to reject the issue presented in point II of the State of Utah's petition is that, even assuming the warnings were gratuitous, the right to counsel was nonetheless equivocally invoked, demanding that police officers clarify that request as instructed by United States v. Smith, 469 U.S. 91 (1984), and State v. Griffin, 754 P.2d 965 (Utah Ct. App. 1988). Moreover, an Eleventh Circuit Court of Appeals opinion indicates the correctness of that analysis. In Tukes v. Dugger, 911 F.2d 508 (11th Cir. 1990), cert. denied, Singletary v. Tukes, 112 S.Ct. 273 (1991), the court noted,

> If the state were free to tell a suspect that he had the right to an appointed lawyer, but could, while continuing to interrogate, refuse to provide the lawyer on the ground that the suspect was not actually in custody, the suspect would be led to believe that no request for counsel would be honored. The coercive effect of continued interrogation would thus be greatly increased because the suspect would believe that the police "promises" to provide the suspect's constitutional rights were untrustworthy, and that the police would continue to violate those rights as they wished, regardless of assurances to the contrary.

Id. 911 F.2d at 516 n.11.

The Supreme Court of Alabama relied on Tukes v. Dugger to decide that the question of custody is no longer critical where a police officer provides yet unrequired warnings which are then invoked by the suspect.

> [C]ustody is not crucial to our holding in this case. We hold that once a police officer informs a person of his or her rights under Miranda, the police must honor that person's exercise of those rights even if the individual is not in custody. Although the Miranda warnings may not have been required if . . . interrogation was noncustodial, once the police officer advised [the suspect] of her rights he was bound to honor her exercise of those rights.

Ex Parte Comer v. State, 1991 WL 175446, at page 3 (Ala. Aug. 16, 1991) (citing Tukes v. Dugger, 911 F.2d 508 (11th Cir. 1990) (footnote omitted)).

A very recent Tenth Circuit Court of Appeals' opinion provides additional rationale for this position and comports with the propriety of the Utah Court of Appeals' decision. In United States v. Kelsey, 50 Cr.L. 1324 (10th Cir. Dec. 20, 1991), the court rejected the government's argument that invocation of the right to counsel is gratuitous unless and until a suspect is subjected to custodial interrogation. Relying on Arizona v. Roberson, 486 U.S. 675 (1988), the Tenth Circuit stated that when a suspect requests counsel, a presumption arises "that he considers himself unable to deal with the pressures of custodial interrogation without legal assistance." Kelsey, 50 Cr.L. at 1325 (quoting Roberson, 486 U.S.

at 683).[2]

When Sgt. Elliot informed Mr. Sampson of his rights at the beginning of the polygraph examination, Mr. Sampson responded with an equivocal request to invoke the right to have counsel assist him in dealing with the inquiries about to take place. Having once alerted and educated Mr. Sampson to his right to have a lawyer assist him, Sgt. Elliot should not then be able to nullify the desire of Mr. Sampson to exercise that right and have legal assistance by arguing, "Well, it was too early to tell him he had the right to a lawyer." By labeling the warnings by Sgt. Elliot as gratuitous, the State of Utah argues that very point. The fifth amendment right to counsel requires more than that urged by the State of Utah. This Court should reject Petitioner's claim of gratuitous and insignificant warnings and allow to stand the Utah Court of Appeals' decision that Mr. Sampson's equivocal request for counsel required clarification to assess his desires; and without that clarification, statements and evidence subsequently acquired violate constitutional strictures requiring exclusion of the evidence. Sampson, 808 P.2d at 1112.

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2. The request for counsel in Kelsey was unequivocal. Nonetheless, the body of law regarding equivocal requests for counsel stems directly from Miranda and Roberson, which both indicate that when a suspect's right to counsel is indicated in any manner that the Edwards' line of cases is accessed and controlling. Smith v. Illinois, 469 U.S. 91 (1984) (indicating that the only difference between unequivocal and equivocal requests for counsel is that police must cease questioning if counsel is unequivocally invoked, and must clarify before continuing interrogation if equivocally invoked).

The final reason this Court should not grant the State's petition on its asserted point II is because no conflict exists between the circuits as claimed by the petitioner. The State of Utah asserts that Davis v. Allsbrooks, 778 F.2d 168 (4th Cir. 1985), conflicts with the Tukes v. Dugger position outlined above. Davis v. Allsbrooks, however, deals with a much narrower question of whether the reading of Miranda warnings to a suspect creates custody. 778 F.2d at 172. The Allsbrooks' court analyzed that position, ruling that the isolated act of reading Miranda warnings to a suspect does not create custody. Id. As such, the Allsbrooks court's decision is not inconsistent with Tukes v. Dugger as claimed by Petitioner but actually permits, for example, the Supreme Court of Alabama in Ex Parte Comer to rely on Tukes v. Dugger for a holding recognizing an invocation of the right to counsel while contemporaneously citing Davis v. Allsbrooks in a footnote to explain that custody technically did not exist. See Ex Parte Comer, 1991 WL 175446 at page 3 and page 5 n.2.

For the above reasons, this Court should not grant the State's petition on its asserted point II. The question is not properly before the court; the appellate court decision is correct and consistent with competent case law; and no genuine conflict exists on the question.

C. REASONS FOR DENYING STATE'S PETITION ON POINT III

In point III of its petition, the State of Utah requests this Court to review the Sampson opinion to clarify which of three views courts should utilize to analyze equivocal requests for counsel. State's petition at pages 16-17. This Court observed that three standards existed to examine claims of equivocal requests for counsel in Smith v. Illinois, 469 U.S. 91 (1984), but refrained from selecting one of the views as most appropriate. The Court identified the three standards as: (1) all questioning must cease upon any request for or reference to counsel; (2) define a threshold standard of clarity for such references to determine whether the reference triggers the right to counsel; and (3) only questions designed to clarify an arguably equivocal statement are permitted and no interrogation may continue until the statement is clarified or counsel is provided. Id. at 96 n.3.

This Court need not grant the State of Utah's petition on this third question it presents because the opinion of the Utah Court of Appeals, like the decision below in Smith, can be affirmed regardless of which standard is applied. See Id. at 96. The first standard requires all questioning to cease upon any request for or reference to counsel. Mr. Sampson's statement responding to the Miranda warnings was, "Well, uh, should I have a lawyer, I mean, well, I'm really not worried about anything, it's just that . . . ." Sampson, 808 P.2d at 1102. This statement would meet the first standard as the statement by Mr. Sampson is a reference to

counsel which fits within the broad language allowing any request or reference to suffice. Because questioning did not completely cease after this reference, standard number one would require affirming the Utah Court of Appeals' opinion.

The second standard would similarly require the appellate court's decision to be affirmed. Mr. Sampson's statement, noted above, fits within a threshold standard of clarity for references to counsel triggering the right to counsel because it is of a nature equal to or surpassing similar statements or references which a majority of courts have identified as sufficient to invoke the fifth amendment right to counsel. Other statements found to be equivocal invocations of the right to counsel are: "Maybe it would be good to have a lawyer?" United States v. Prestigiacomo, 504 F.Supp. 681 (E.D.N.Y. 1981); "Why should I not get an attorney?" United States v. Cherry, 773 F.2d 1124 (5th Cir. 1979); "Maybe I should have an attorney." Maglio v. Jago, 580 F.2d 202, 205 (6th Cir. 1978); "I had better talk to a lawyer." United States v. Clark, 499 F.2d 802, 805 (4th Cir. 1974); "Might want to talk to a lawyer." United States v. Fouche, 776 F.2d 1398, 1404 (9th Cir. 1985); "I would like to have a lawyer, but I'd rather talk to you." Nash v. Estelle, 597 F.2d 513, 516 (5th Cir. 1979); "Do you think I need an attorney?" State v. Smith, 661 P.2d 1001, 1003 (Wash. App. 1983); and "When do you think I'll get to see a lawyer?" Hall v. State, 326 S.E.2d 812, 818 (Ga. 1985). See, also, Sampson, 808 P.2d at 1108-09 (additional cases cited therein demonstrating threshold equivocal references to counsel similar to that made by Mr. Sampson).

The third standard identified by this Court in Smith v. Illinois, of course, is the standard actually employed in this case by the Utah Court of Appeals.[3] Notably, that analysis is not attacked in this petition by the State of Utah as inaccurate or erroneous. The appellate court expressly found the statement by Mr. Sampson sufficient to invoke his right to counsel and that the fifth amendment to the United States Constitution was violated when Sgt. Elliot failed to clarify that request and proceeded with the polygraph and subsequent interrogation.

Accordingly, point III in the State's petition should not be accepted for review as this case is simply not the vehicle to clarify which of the three approaches is preferred by this Court.

II. THE UTAH COURT OF APPEALS PROPERLY APPLIED THE EXCLUSIONARY RULE IN THIS CASE.

The State of Utah's final claim in its petition is that the Court should review and clarify the question of admissibility of physical evidence seized after a Miranda violation. The request illustrates the State's inability and/or unwillingness to understand the opinion from the Utah Court of Appeals and to differentiate between a Miranda violation and a fifth amendment violation and between the right to silence and the right to counsel.

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3. Subsequent to Smith v. Illinois, a separate panel of the Utah Court of Appeals authored State v. Griffin, 754 P.2d 965 (Utah Ct. App. 1988), selecting as Utah's position--from the three available choices--the clarification approach employed by the panel in Sampson. Id. at 969; Sampson, 808 P.2d at 1109.

The Utah Court of Appeals explicitly held that the police failure to clarify the equivocal request for counsel made by Mr. Sampson was an error of constitutional magnitude, a violation of the fifth amendment. Sampson, 808 P.2d at 1112 (direct appeal portion of the opinion) and at 1114-17 (rehearing portion of the opinion). Petitioner raised this claim as a new matter on rehearing before the Utah Court of Appeals. Id. at 1112. The Court of Appeals rejected the claim because the State of Utah confused the issues by relying on technical Miranda violation cases and right to silence cases to make its point. Id. at 1113-14 (citing, Oregon v. Elstad, 470 U.S. 298 (1985); and Martin v. Wainwright, 770 F.2d 918 (11th Cir. 1985), cert. denied, 479 U.S. 909 (1986).

The appellate court distinguished these and other cases cited by the State of Utah as factually and legally distinct from the Sampson case. Sampson, 808 P.2d at 114-15 nn. 24-25. The analysis and reasoning of the Utah Court of Appeals is detailed and sound. The challenge by the State of Utah in its petition does not address the court's conclusions because it neglects the elevated position of the right to counsel. This Court has explained the basis for treating this right with more importance.

> The rule in Miranda . . . was based on this Court's perception that the lawyer occupies a critical position in our legal system because of his unique ability to protect the fifth amendment rights of a client undergoing custodial interrogation. Because of this special ability of the lawyer to help the client preserve his fifth amendment rights once the client becomes enmeshed in the adversary process, the Court found that "the right to have counsel present at the interrogation is

> indispensable to the protection of the fifth amendment privilege under the system" established by the Court.

Arizona v. Roberson, 486 U.S. 675, 682-83 n.4 (1988) (citing, Fare v. Michael C., 442 U.S. 707, 719 (1979)).

The Roberson Court, citing Michigan v. Mosley, 423 U.S. 96, 101 n.7 (1975), further clarified the existence of the distinction between a suspect's decision to cut off questioning (i.e., right to silence) and a request for assistance of counsel. 486 U.S. at 683. While Mosley held that police must immediately cease the interrogation once the right to silence has been asserted, that opinion permitted police to resume interrogation after the passage of a significant time period and after providing a fresh set of Miranda warnings. 423 U.S. at 106. The Roberson Court, however, rejected that same position regarding the request for the right to counsel. Regarding the right to have counsel present during questioning, the Court adhered to the "bright-line" rule of Edwards v. Arizona, 451 U.S. 477 (1981), that interrogation must immediately cease and may not resume even after an extended period of time and even with new Miranda warnings unless and until the attorney is provided or the suspect initiates the questioning. Roberson, 486 U.S. at 682.

These cases solidify the constitutional nature of the violation in Sampson and elucidate why a right to counsel case or technical violation case, like Oregon v. Elstad, Martin v. Wainwright and the others cited by Petitioner, are insufficient to justify granting the petition as urged by the State. The Utah Court

of Appeals' analysis and holding withstands the continued assertion by the State that the violation was technical only. This Court should deny the State of Utah's request regarding point IV of its petition. The exclusionary rule is properly applied to this case.

CONCLUSION

For these reasons, the petition for writ of certiorari should be denied.

Respectfully submitted this 23 day of January, 1992.

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Counsel of Record

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Attorney for Respondent

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Attorney for Respondent

APPENDIX A

for Elm simply said at the end of the sentencing hearing: "Your Honor, just for the purpose of the record, may we express our objection to the sentencing so we may be able to preserve that for purposes of appeal?"

The only exception to the rule that objections need to be timely and specific in order to be considered on appeal is if the alleged error constitutes "plain error." Utah R.Evid. 103(d); *Whittle* at 821; *see State v. Eldredge*, 773 P.2d 29, 35–36 (Utah), *cert. denied*, 493 U.S. ——, 110 S.Ct. 62, 107 L.Ed.2d 29 (1989) (detailed analysis of Utah R.Evid. 103(d)). In order for an error to be "plain," an appellate court must find that it should have been obvious to the trial court that it was committing error. *Eldredge* at 35. We have examined the records of the sentencing hearing and the arguments of both parties. None of the errors cited rise to the level of "plain error."

The sentence is affirmed.

HALL, C.J., and STEWART, DURHAM and ZIMMERMAN, JJ., concur.

STATE of Utah, Plaintiff and Appellee,

v.

Carlos R. SAMPSON, Defendant and Appellant.

No. 890327–CA.

Court of Appeals of Utah.

Sept. 11, 1990.

On Rehearing March 15, 1991.

Defendant was convicted of murder. Judgment was entered in the Third District Court, Salt Lake County, David S. Young, J. Defendant appealed. The Court of Appeals, Orme, J., held that: (1) defendant was in custody at time he made inculpatory statements, so as to be required to be given proper *Miranda*, warnings; (2) defendant had not waived right to be represented by attorney when he stated to officer administering polygraph test that "should I have a lawyer, I mean * * * I'm really not worried about anything, it is just that * * *"; (3) police did not achieve clarification of equivocal request for counsel by repeating *Miranda* warnings; and (4) police violation did not constitute mere technical failure to comply with *Miranda* rules, but was a Fifth Amendment violation requiring suppression of confession and related evidence.

Affirmed.

1. Criminal Law ⇐1158(4)

In determining whether *Miranda* warnings were properly given, appeals court does not accord any particular deference to trial court's conclusions, although couched as findings, but rather reviews them for correctness.

2. Criminal Law ⇐517.2(3)

Defendant in murder case had been subject to custodial interrogation and was entitled to proper *Miranda* warnings at time he confessed to having killed his daughter; police had focused on him as perpetrator, to exclusion of other possibilities, almost from time he first reported daughter as missing, and prior to statement defendant had been subjected to accusatory questions. U.S.C.A. Const.Amend. 5.

3. Criminal Law ⇐414

State has heavy burden to establish both that defendant understood his *Miranda* rights and that he voluntarily waived them. U.S.C.A. Const.Amend. 5.

4. Criminal Law ⇐412.2(5)

Defendant in murder case did not knowingly and intelligently waive *Miranda* rights by stating, prior to submitting to lie detector test administered in police station and after receiving *Miranda* warnings, that "should I have a lawyer * * * I'm really not worried about anything, it is just that * * *"; only response administrator

of test was allowed to make following that statement was clarification as to intent of defendant, and instead of seeking clarification administrator stated "okay, if you are not worried about anything I would say that is fine." U.S.C.A. Const.Amend. 5.

On Petition for Rehearing

5. Criminal Law ⇐412.2(3, 4)

Repetition of *Miranda* warnings, following defendant's equivocal request for counsel, did not authorize police to continue interrogation of defendant; equivocal request was required to be treated by police and analyzed by courts as though it were an unambiguous request for counsel, until such time as it had been properly clarified and shown to be otherwise. U.S.C.A. Const.Amend. 6.

6. Criminal Law ⇐412.2(4), 517.2(1), 537

Police response to murder suspect's equivocal request for counsel, repetition of *Miranda* warning and continuation of interrogation, was not a mere technical violation of *Miranda* rules; it constituted a Fifth Amendment violation requiring suppression of confession and derivative evidence. U.S.C.A. Const.Amend. 5.

Andrew A. Valdez, Elizabeth A. Bowman, argued, and Richard G. Uday, argued, Salt Lake Legal Defender Ass'n, Salt Lake City, for defendant and appellant.

R. Paul Van Dam, State Atty. Gen., and Charlene Barlow, argued, Asst. Atty. Gen., Salt Lake City, for plaintiff and appellee.

Before BILLINGS, GREENWOOD and ORME, JJ.

OPINION

ORME, Judge:

Defendant appeals his conviction for criminal homicide, murder in the second degree, a first degree felony in violation of Utah Code Ann. § 76-5-203 (1990). We reverse and remand for a new trial.

On November 24, 1986, at approximately 10:30 p.m., defendant entered a 7-Eleven store in Salt Lake County and told the clerks that his daughter had been kidnapped. He asked them to call the police, which they did.

Deputies from the Salt Lake County Sheriff's Office responded. Defendant informed them that his daughter had been abducted from his truck. He gave them a description of his daughter and a photograph. The officers investigated the alleged kidnapping until 4:00 a.m. At some point during the evening, defendant was informed the police did not believe his story. The officers asked defendant to come to headquarters the following morning for a polygraph examination. He agreed.

At approximately 10:30 a.m. on November 25, defendant arrived at police headquarters. He was met by the polygraph examiner, Sergeant Elliot, who had been briefed about the events which occurred on the prior evening. Defendant was escorted to a small interrogation room, hooked up to a polygraph machine, and instructed about how polygraph machines worked. Sgt. Elliot then explained the purpose for giving defendant the test. He said:

> When we walk out of here we ought to be able to tell the detectives Carlos is truthful when he says the child was taken out of the truck, he had not prearranged with anyone to take the child. Uh, also, Carlos is not involved in the death of the child if the child is, in fact, dead. And, uh, those are the two things that we will accomplish today.[1]

After explaining to defendant the purpose of the test, Sgt. Elliot gave defendant the *Miranda* warnings. He began by stating: "Because you are in the cop shop

1. These purposes were again repeated during the exam, with even more specificity. Later in the exam, Sgt. Elliot stated:

> Okay, good, okay, uh, at the beginning of the test I told you what the things were that we needed to show. Number one is that you did not arrange with anyone to take the child but that you haven't got someone taking care of her, she is not hidden out and you are not doing this to deprive Antoinette visitation of the child. And, uh, secondly, you did nothing to injure the child and you, and if she in fact is not alive, did not cause her death, right?

there is no doubt in your mind that this is the police station and, uh, because you are in taking a polygraph from a law enforcement agency I must advise you of your rights again."[2] After reading defendant each of his rights, the following exchange ensued:

> Elliot: Okay, having these rights in mind do you wish to talk to me now.
>
> Sampson: Well, uh, should I have a lawyer, I mean, well, I'm really not worried about anything, it is just that....
>
> Elliot: Okay, if you are not worried about anything I would say that is fine, let's go ahead and proceed. Let's get this thing done and get it over with and see what we can do.
>
> Sampson: I'm willing to get it over with.

Defendant then read and signed a form listing his *Miranda* rights and indicating his willingness to take the polygraph test.

During the polygraph examination, Sgt. Elliot asked defendant whether he arranged the disappearance or caused the death of his child and whether he knew where she was hidden.[3] He asked defendant this series of questions four times. To the question concerning where his daughter was hidden, defendant responded in the negative each time and each time the polygraph suggested a deceitful response. After the last set of questions, Sgt. Elliot informed defendant about the test results. He asked defendant why his response to the question concerning whether he knew where his daughter was hidden appeared to be false. Defendant said he thought maybe the child's mother had done something with her.

After concluding the examination, Sgt. Elliot and defendant went to find Salt Lake County Sheriff Pete Hayward. Sgt. Elliot told Sheriff Hayward about the test results. He told him that he believed defendant had been untruthful and informed him that defendant had been "Mirandized," but apparently did not acquaint the sheriff with the particulars of defendant's responses after his rights had been read to him.

Sheriff Hayward then returned with defendant to the polygraph room for further questioning. He did not give defendant the *Miranda* warnings.[4] He informed defendant that there were inconsistencies in his story and that he did not believe defendant was telling the truth. He then asked defendant whether he had injured his daughter. Ultimately, defendant stated his daughter was dead and that he could show the police where she was located.

Defendant accompanied Sheriff Hayward and another deputy to a dumpster in American Fork where his daughter's body was located. After retrieving the body, the officers placed defendant under arrest and returned him to Salt Lake City. When the officers again met with defendant, defendant was read his *Miranda* rights. He agreed to talk with the investigating officer, who thereafter questioned him concerning the circumstances surrounding his daughter's death.

Prior to trial, defense counsel filed a motion to suppress all statements made by defendant during and after the polygraph examination on November 25, 1986, and all evidence derived as a result of those statements. Counsel argued that the police officers had violated defendant's *Miranda* rights by continuing to question him after he made an equivocal request for counsel. The trial court denied the motion.

In support of its decision to deny defendant's motion to suppress, the court stated in pertinent part:

2. It is not clear from the record why Sgt. Elliot stated that he had to advise defendant of his rights "again." It is clear, however, that the first and only *Miranda* warnings defendant received prior to his formal arrest were given by Sgt. Elliot at the outset of the polygraph examination.

3. The specific inculpatory questions asked during the examination were:

> 1) Have you caused the death of Miyako?
>
> 2) Do you know where Miyako is hidden now?
>
> 3) Have you arranged the disappearance of Miyako?

4. It is not entirely clear why the sheriff did not give defendant his *Miranda* warnings. Apparently, however, he relied upon Sgt. Elliot's explanation that defendant had been "Mirandized."

The court finds, first, that as you have agreed, the standard of evidence must be a preponderance of the evidence [5] to establish the voluntariness of the interrogation and waiver.

Court finds that the defendant clearly understood what his rights were and what he was waiving, that there is nothing in the record to show that the police did anything or acted in any way improperly so as to constitute any kind of coercion [6] in this matter so as to cause the defendant not to fully understand his rights and to leave him in a position where he was acting in a coerced sort of way....

I believe he had an unfettered right of choice, that he did not request an attorney, that the language "Well, ah, should I have a lawyer, I mean, well, I'm really not worried about anything, it is just that ..." is not sufficient to cause the police to be concerned as to the claim or any suggestion that the defendant wished to claim a right to counsel.

I also find that there was no need to give continuous advice as to subsequent requests for the selection of counsel [7] or the waiver of the same.

I also find further that the forum was adequate, the [rights] were clearly explained to the defendant. He voluntarily and knowingly waived his right to counsel and I cannot find that the motion to suppress should be granted and, therefore, it is denied.

A five-day jury trial was held in September 1987. Having lost his motion to suppress, defendant sought and obtained a continuing objection to the admission of evidence resulting from the police interrogation. At the conclusion of the trial, the jury found defendant guilty of second degree homicide. He was sentenced to a term of five years to life at the Utah State Prison.

Defendant has raised numerous issues on appeal, but his primary contention is that the court committed prejudicial error when it denied his motion to suppress. Because we must reverse and remand on this issue, we need not address the other issues raised by defendant.

[1] Neither party has identified the standard of review for this appeal. However, both parties apparently concede that the trial court's ultimate conclusions concerning the waiver of defendant's *Miranda* rights, which conclusions were based upon essentially undisputed facts, in particular the transcript of Sgt. Elliot's colloquy with defendant, present questions of law reviewable under a correction-of-error standard. Such a conclusion is consistent with the general notion that a trial court's "findings" based upon undisputed facts present questions of law on appeal. *Diversified Equities, Inc. v. American Sav. & Loan Assoc.*, 739 P.2d 1133, 1136 (Utah Ct.App. 1987) (quoting *City of Spencer v. Hawkeye Sec. Ins. Co.*, 216 N.W.2d 406, 408 (Iowa 1974)). *Cf. Transamerica Cash Reserve, Inc. v. Dixie Power & Water, Inc.*, 789 P.2d 24, 25 (Utah 1990) (same standard for review of summary judgment, which necessarily involves undisputed facts). *See also People v. Russo*, 148 Cal.App.3d 1172, 196 Cal.Rptr. 466, 468 (1983) (where *Miranda* warnings and ensuing discussion were recorded, facts deemed undisputed and appel-

5. At least one Utah case has recognized "preponderance of the evidence" as the appropriate standard for determining the voluntariness of a waiver of *Miranda* rights. *See State v. Moore*, 697 P.2d 233, 236 (Utah 1985). The preponderance standard is difficult to square with *Miranda*'s holding that the state bears a heavy burden, if counsel was not present, to show a knowing and intelligent waiver of the defendant's *Miranda* rights. *See Miranda v. Arizona*, 384 U.S. 436, 475, 86 S.Ct. 1602, 1628, 16 L.Ed.2d 694 (1966). Nonetheless, the United States Supreme Court has adopted the "preponderance of the evidence" test in evaluating *Miranda* waiver questions. *Colorado v. Connelly*, 479 U.S. 157, 107 S.Ct. 515, 523, 93 L.Ed.2d 473 (1986).

6. The court's comment on coercion represents a bit of an overstatement in view of *Miranda*'s recognition that custodial interrogation is inherently coercive. *See* 384 U.S. at 467, 86 S.Ct. at 1624.

7. Despite the court's phraseology in its remarks from the bench, it is apparent from the record that defendant never made any "subsequent requests" for counsel after his statement to Sgt. Elliot.

late court required to "independently assess whether [defendant] knowingly and intelligently waived his rights"). Thus, we do not accord any particular deference to the trial court's conclusions, although couched as findings, but, rather, review them for correctness. *Scharf v. BMG Corp.*, 700 P.2d 1068, 1070 (Utah 1985).

In *Miranda v. Arizona*, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966), the United States Supreme Court stated that "the prosecution may not use statements ... stemming from custodial interrogation of the defendant unless it demonstrates the use of procedural safeguards effective to secure the privilege against self-incrimination." *Id.* at 444, 86 S.Ct. at 1612. One of those procedural safeguards is a warning that the defendant has the right to an attorney during custodial interrogation. *Id.* Moreover, the Court noted that if defendant "indicates in any manner and at any stage of the process that he wishes to consult with an attorney before speaking there can be no questioning." *Id.* at 444–45, 86 S.Ct. at 1612. Finally, when custodial interrogation continues without the presence of a defense attorney and damaging evidence results from the interrogation, the state has a heavy burden to show that the defendant knowingly and intelligently waived his *Miranda* rights. *Id.* at 475, 86 S.Ct. at 1628.

We must address two questions in this appeal. First, we must determine whether defendant was subject to "custodial interrogation" at the time he made his incriminating statements. Second, assuming custodial interrogation, we must determine whether defendant requested, or knowingly and intelligently waived his right to, counsel.

CUSTODIAL INTERROGATION

[2] Initially, defendant claims the state failed to raise below the issue of whether there actually was a "custodial interrogation" and thus should be precluded from arguing on appeal that there was not. *See generally State v. Marshall*, 791 P.2d 880, 885–87 (Utah Ct.App.1990). Though we agree the state did not dwell on the issue, it was sufficiently raised at the suppression hearing to be preserved for this appeal. We note, however, that the trial court did not base its denial of the motion to suppress upon the lack of custody nor intimate any doubt that the colloquy between Sgt. Elliot and defendant occurred in conjunction with a custodial interrogation. Instead, it concluded that defendant was informed of his rights, understood his rights, and voluntarily waived them—conclusions which would be irrelevant if the court thought there had been no custodial interrogation.

In *Miranda*, the United States Supreme Court defined "custodial interrogation" as "questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way." *Miranda v. Arizona*, 384 U.S. 436, 444, 86 S.Ct. 1602, 1612, 16 L.Ed.2d 694 (1966). The Court expanded on this definition in *Oregon v. Mathiason*, 429 U.S. 492, 97 S.Ct. 711, 50 L.Ed.2d 714 (1977) (per curiam). "*Miranda* warnings are required only where there has been such a restriction on a person's freedom as to render him 'in custody.'" *Id.* at 495, 97 S.Ct. at 714. Later, in *California v. Beheler*, 463 U.S. 1121, 103 S.Ct. 3517, 77 L.Ed.2d 1275 (1983) (per curiam), the Court stated that "the ultimate inquiry is simply whether there is a 'formal arrest or restraint on freedom of movement' of the degree associated with a formal arrest." *Id.* at 1125, 103 S.Ct. at 3520.

Moreover, the United States Supreme Court has indicated that the test is an objective one, i.e., that "the only relevant inquiry is how a reasonable man in the suspect's position would have understood his situation." *Berkemer v. McCarty*, 468 U.S. 420, 442, 104 S.Ct. 3138, 3151, 82 L.Ed.2d 317 (1984). *See, e.g., Hunter v. State*, 590 P.2d 888, 895 (Alaska 1979) (The question is not whether the particular defendant considered himself in custody, but whether a "reasonable person [under the same circumstances] would feel he was not free to leave and break off police question-

ing."); *People v. Algien*, 180 Colo. 1, 501 P.2d 468, 471 (1972) (en banc).

The Utah Supreme Court has identified several key factors to consider in order to determine when a defendant

> who has not been formally arrested is in custody. They are: (1) the site of interrogation; (2) whether the investigation focused on the accused; (3) whether the objective indicia of arrest were present; and (4) the length and form of interrogation.

Salt Lake City v. Carner, 664 P.2d 1168, 1171 (Utah 1983). Another factor which we find pertinent to our analysis was recognized by our Oregon counterpart in *State v. Herrera*, 49 Or.App. 1075, 621 P.2d 1209 (1980). That factor is (5) whether the defendant came to the place of interrogation freely and willingly. *Id.*, 621 P.2d at 1212. We now apply these five factors, along with the objective standard adopted in *Berkemer*, to the undisputed facts in this case.

A brief mention of factors (1), (3) and (5) is sufficient because we find them relatively "neutral." Concerning factor (1), the site of interrogation was the police station. Station-house questioning lends itself to a finding of custody, a concept which Sgt. Elliot recognized in his "cop shop" introductory remark, although that fact alone is not conclusive. *See, e.g., Mathiason*, 429 U.S. at 495, 97 S.Ct. at 714. Considering factor (3), defendant was apparently not securely restrained or told that he was under arrest until after his daughter's body was discovered. However, it is pertinent to note that he was not specifically informed of his freedom to leave[8] and that once the polygraph examination started, he was restrained in the limited sense that he was hooked to the polygraph machine.[9] Turning to factor (5), the defendant went voluntarily to the police station after receiving an invitation to do so. The fact that he went voluntarily, however, does not mean he was free to leave during the entire remainder of the interrogation.

The two factors which conclusively tip the scale and persuade us that defendant was in custody are factors (2), the focus of the investigation, and (4), the form of the interrogation. The interplay of these two factors at the time defendant made incriminating statements would lead a reasonable person to believe that he was not free to leave.

Concerning factor (2), the state essentially concedes that the investigation in this case had focused exclusively on defendant. Before the conclusion of the evening when defendant reported the fictitious kidnapping, officers had informed defendant that they did not believe his story. As a result of their disbelief, they requested defendant to return the following morning for a polygraph test. Nothing in the record suggests other suspects were sought or questioned, or other leads pursued, in the meanwhile. The questions asked during the polygraph examination clearly indicate a strong suspicion that defendant had kidnapped or killed his own daughter. It is obvious from these facts that defendant was the prime, if not exclusive, suspect of the police investigation. A reasonable person under the circumstances would surely so have concluded, especially given the expressed disbelief at his story.

Finally, factor (4) weighs heavily in favor of a determination of custody. Utah courts have placed a great deal of emphasis on the form of the questioning in these types of cases. As long as questioning remains merely investigatory, courts have not found custody. *See, e.g., State v. Kelly*, 718 P.2d 385, 391 (Utah 1986). However, when investigatory questioning shifts to accusatory questioning, custody is likely and *Miranda* warnings become necessary. *Carner*, 664 P.2d at 1170. *See also Kelly*, 718 P.2d at 391. The change from investi-

8. Under certain circumstances, even defendants who are told they are free to leave will nonetheless be held to have been subjected to custodial interrogation. *See, e.g., United States v. Lee*, 699 F.2d 466, 467–68 (9th Cir.1982) (per curiam).

9. According to the transcript of the polygraph examination, the polygraph machine was attached to defendant by two tubes encircling his trunk, finger plates on his ring and index fingers, and a blood pressure cuff on his right arm.

gatory to accusatory questioning occurs when the "police have reasonable grounds to believe that a crime has been committed and also reasonable grounds to believe that the defendant committed it." *Carner*, 664 P.2d at 1171. *See also Kelly*, 718 P.2d at 391.

Assuming, without deciding, that the polygraph examination itself was merely investigatory,[10] we find that the questioning became accusatory when Sgt. Elliot and Sheriff Hayward determined that defendant had lied on the exam. The officers knew prior to the polygraph exam that a crime had been committed. They suspected kidnapping and possibly even murder. Moreover, they clearly suspected defendant as the perpetrator of the crime. The polygraph exam results merely confirmed their suspicions. Knowing the suspicions of the police and then being confronted with the polygraph exam results, a reasonable person in defendant's position would not have considered himself free to leave at that time.[11] Thus, we hold that, at least as of the time of Sheriff Hayward's questioning of defendant, defendant was subject to custodial interrogation and entitled to proper *Miranda* warnings.

This case is similar to, and the result we reach consistent with, the Colorado case of *People v. Algien*, 180 Colo. 1, 501 P.2d 468 (1972) (en banc). In *Algien*, the defendant, along with other individuals, was suspected of arson. 501 P.2d at 469. He voluntarily submitted to a polygraph examination. *Id.* At no time was he advised of his *Miranda* rights. *Id.*, 501 P.2d at 470. Prior to the examination he was informed that the purpose of the test was to determine his involvement in the fire. *Id.*, 501 P.2d at 469–70. He was then asked questions concerning his guilt. *Id.* The exam was given three times and each time the test indicated his negative responses were not truthful. *Id.*, 501 P.2d at 470. At the conclusion of the test, he was confronted with the opinion that he was lying and, after discussing the matter, defendant confessed. *Id.*

The trial court in *Algien* found that once the officers concluded defendant was lying during the exam, the suspicion of guilt focused on him and the officers should have read him his *Miranda* rights. *Id.* The Colorado Supreme Court agreed with the trial court and held that "a reasonable person would with logic conclude that he could not leave the premises of his own free will but would be detained for formal arrest." *Id.* at 471. Consequently, it affirmed the decision of the trial court to suppress defendant's confession.

Other courts have applied an *Algien*-type analysis to post-polygraph confessions. *See, e.g., State v. Wright*, 97 N.J. 113, 477

10. In view of the result we reach, we need not decide in this case whether the polygraph examination as such was accusatory interrogation and whether defendant was in custody from the inception of the exam. We note, however, that numerous courts have leaned toward finding such examinations to be custodial, a view which seems to command majority support and to be well-reasoned. *See, e.g., State v. Wright*, 97 N.J. 113, 477 A.2d 1265, 1269 (1984) (noting that strict *Miranda*-type analysis is typically applied to polygraph confessions); *Commonwealth v. Bennett*, 439 Pa. 34, 264 A.2d 706, 707 (1970) (state's suggestion that defendant was not in custody for polygraph was "attempt to have [court] submerge [its] intelligence"); *State v. Faller*, 88 S.D. 685, 227 N.W.2d 433, 435 (1975) ("situation a lie detector test presents can best be described as a psychological rubber hose"); *Creeks v. State*, 542 S.W.2d 849, 851 (Tex.Cr.App.1976) (where investigation has focused on defendant, *Miranda* warnings required before polygraph); *People v. Carter*, 7 Cal.App.3d 332, 88 Cal.Rptr. 546, 549 (1970) ("Questioning during the course of a lie detector test certainly qualifies as a form of custodial interrogation."), *overruled on other grounds*, 6 Cal.3d 441, 492 P.2d 1, 99 Cal.Rptr. 313 (1972). *But see, e.g., Whalen v. State*, 434 A.2d 1346, 1352 (Del.1980) ("appearance at the police station for the polygraph test demonstrates a waiver of his *Miranda* rights"), *cert. denied*, 455 U.S. 910, 102 S.Ct. 1258, 71 L.Ed.2d 449 (1982); *People v. Bailey*, 140 A.D.2d 356, 527 N.Y.S.2d 845, 847–48 (1988) (willingness to aid in investigation demonstrated that polygraph not custodial).

11. The state cites testimony to the effect that defendant did not consider himself under arrest even after he was formally arrested, suggesting this demonstrates that defendant could not have believed he was in custody when he first confessed. This evidence is at most a commentary on defendant's acumen. Under the objective "reasonable person" test, defendant's subjective belief about custody is not relevant. *Berkemer v. McCarty*, 468 U.S. 420, 442, 104 S.Ct. 3138, 3151, 82 L.Ed.2d 317 (1984).

A.2d 1265, 1269 (1984) ("When defendants are not advised of their *Miranda* rights, or do not properly waive them, confessions elicited *after* a polygraph test are typically suppressed."); *People v. Harris*, 128 A.D.2d 891, 513 N.Y.S.2d 817, 818 (1987) (mem.) (confession admissible because defendant appeared voluntarily for polygraph test and fully advised of rights before post-polygraph confession). The rationale of these polygraph cases comports with our view of custodial interrogation and thus we adopt their reasoning in this case.

We need not decide whether defendant was in custody from the inception of the polygraph examination[12] because no confession was elicited until after the exam was completed and the sheriff summoned. It is sufficient to conclude that, Sgt. Elliot having determined defendant was lying in the exam, *Miranda* warnings were necessary before further questioning could properly proceed.

It is clear from the record that defendant was not given *Miranda* warnings between the conclusion of the polygraph exam and the time he was formally arrested.[13] Thus, unless we find that defendant's *Miranda* rights were adequately protected by reason

12. *But see* note 10, *supra*. It is interesting to note that the polygraph examiner considered *Miranda* warnings at the outset of the polygraph examination to be a necessity. He stated: "Because you are in the cop shop there is no doubt in your mind that this is the police station and, uh, because you are in taking a polygraph from a law enforcement agency I must advise you of your rights...." *But see People v. Sohn*, 148 A.D.2d 553, 539 N.Y.S.2d 29, 31 (1989) (mem.) (giving of *Miranda* warnings was "apparently out of an 'excess of caution' [and did] not preclude a finding that [defendant] was not in custody").

Sergeant Elliot's approach, whether or not legally required, surely seems prudent, if for no other reason than that it forecloses the possibility a suspect will blurt out a confession after his deception has been ascertained but before *Miranda* warnings can be issued. Moreover, as an arm of the state, the police have a responsibility to protect the constitutional rights of the citizenry, and erring on the side of giving the *Miranda* warnings before they are strictly required advances that function, as well as minimizes the risk that important evidence will be excluded because the warnings were not given early enough in the process.

13. As indicated previously, Sheriff Hayward apparently relied upon Sgt. Elliot's claim that defendant had been properly "Mirandized" at the commencement of the polygraph exam. Although Sheriff Hayward, out of the same abundance of caution that may have motivated Sgt. Elliot, should ideally have given new *Miranda* warnings to defendant prior to interrogating him, the earlier warnings would have sufficed had Sgt. Elliot elicited a clear waiver of those rights from defendant at that time. *See State v. Martinez*, 595 P.2d 897, 899–900 (Utah 1979) (the law does not require repetition of *Miranda* rights within a short period of time and a continuous sequence of events even though defendant's status may actually change in the interim).

The state did not argue that Sheriff Hayward's "good faith" reliance upon Sgt. Elliot's claim he previously issued *Miranda* warnings warranted an exception to the exclusionary rule. However, we note that, contrary to the trend in the Fourth Amendment area, courts have declined to create a "good faith" exception in the context of the Fifth Amendment. *United States v. Scalf*, 708 F.2d 1540, 1544 (10th Cir.1983) (per curiam) ("once a suspect has invoked the right to counsel, knowledge of that request is imputed to all law enforcement officers who subsequently deal with the suspect"). *See also Arizona v. Roberson*, 486 U.S. 675, 108 S.Ct. 2093, 2101, 100 L.Ed.2d 704 (1988) (implicitly rejecting "good faith" argument); *White v. Finkbeiner*, 687 F.2d 885, 887 n. 9 (7th Cir.1982) (declining to create exception absent clear indication from United States Supreme Court), *vacated on other grounds*, 465 U.S. 1075, 104 S.Ct. 1433, 79 L.Ed.2d 756 (1984).

An excellent treatment of a possible "good faith" exception to the Fifth Amendment exclusionary rule is found in M. Gardner, *The Emerging Good Faith Exception to the Miranda Rule—A Critique*, 35 Hastings L.J. 429 (1984). Professor Gardner concludes:

> While there may be reason to doubt the constitutional necessity of the fourth amendment exclusionary rule, the fifth amendment privilege *is itself* a constitutionally required exclusionary rule. Whereas a fourth amendment violation occurs at the moment of the unlawful privacy violation, violations of the privilege against self-incrimination do not occur unless and until the government uses the tainted evidence against the defendant in a criminal proceeding. Although alternatives to the exclusionary rule might conceivably be developed to protect fourth amendment privacy interests, no alternative could possibly protect the fifth amendment values of maintaining an accusatorial system and respecting the dignity of criminal defendants. If use of compelled self-incriminating evidence is permitted, the fifth amendment's protection is destroyed.

Id. at 462–63.

of the exchange at the outset of the polygraph examination undertaken by Sgt. Elliot,[14] there was no adequate "Mirandizing" of defendant before he gave his custodial confession. We now examine whether defendant validly waived his *Miranda* rights at that time.

WAIVER

On appeal, defendant does not argue that the state failed to adequately inform him of his *Miranda* rights. Prior to the polygraph examination, Sgt. Elliot carefully informed defendant of each of his rights. Instead, defendant argues that he made an "equivocal request" for counsel which the state failed to clarify and, if appropriate, to honor. It is telling that the state does not address this issue on appeal, but instead puts all its eggs in the "no custodial interrogation" basket. Nonetheless, because the state stops short of conceding the point and in view of its importance, we will address the issue in some detail.

[3] Initially we note that, though a defendant may waive his rights to remain silent and to have an attorney present during custodial interrogation, "these waivers must be both intentional and made with full knowledge of the consequences, and the defendant is given the benefit of every reasonable presumption against such a waiver." *State v. Fulton*, 742 P.2d 1208, 1211 (Utah 1987), *cert. denied*, 484 U.S. 1044, 108 S.Ct. 777, 98 L.Ed.2d 864 (1988). *See also Brewer v. Williams*, 430 U.S. 387, 404, 97 S.Ct. 1232, 1242, 51 L.Ed.2d 424 (1977). Consequently, the state has a heavy burden to establish both that a defendant understood his *Miranda* rights and that he voluntarily waived them. *State v. Velarde*, 734 P.2d 440, 443 (Utah 1986).

[4] The state argued below, and the trial court found, that defendant's statement "Well, ah, should I have a lawyer, I mean, well, I'm really not worried about anything, it is just that ..." did not qualify as even an equivocal request for counsel which the police had to be concerned about. We disagree.

In *Miranda*, the United States Supreme Court stated: "If [defendant] indicates *in any manner* and at any stage of the process that he wishes to consult with an attorney before speaking there can be no questioning." 384 U.S. at 444–45, 86 S.Ct. at 1612 (emphasis added). Thus, a defendant's "request for counsel may be ambiguous or equivocal," *Smith v. Illinois*, 469 U.S. 91, 95, 105 S.Ct. 490, 493, 83 L.Ed.2d 488 (1984) (per curiam), and still qualify as an invocation of *Miranda* rights.

This court dealt with an equivocal request for counsel in *State v. Griffin*, 754 P.2d 965 (Utah Ct.App.1988). In *Griffin*, the defendant stated during interrogation, "This is a lie. I'm calling an attorney." *Id.* at 966. We held that this statement "was arguably equivocal." *Id.* at 969. Defendant's statement in this case was less forceful than that in *Griffin*. However, other jurisdictions have found statements very similar to the one in this case to have constituted equivocal requests for counsel. *See, e.g., United States v. Cherry*, 733 F.2d 1124, 1127 (5th Cir.1984) ("Maybe I should talk to an attorney before I make a further

14. We note that defendant was given a second set of *Miranda* warnings after he had informed Sheriff Hayward that his daughter was dead, gone with the police to American Fork to retrieve the body, been arrested, and been returned to Salt Lake City. Apparently recognizing that by that time all the damage had been done, the state does not argue the second set of *Miranda* warnings are of any consequence to our analysis.

Defendant, on the other hand, argues that because he had previously invoked his right to counsel, albeit equivocally; had not been provided an attorney; and had not initiated any subsequent interrogation with the police, the fruits of the post-arrest interrogations must also be suppressed. We agree. In *Edwards v. Arizona*, 451 U.S. 477, 101 S.Ct. 1880, 68 L.Ed.2d 378 (1981), the United States Supreme Court held that once a defendant has invoked his right to counsel, statements made without counsel in subsequent interrogations initiated by the police, even when pursuant to renewed *Miranda* warnings, must be suppressed. *Id.* at 484–87, 101 S.Ct. at 1884–86. *See also State v. Moore*, 697 P.2d 233, 237 (Utah 1985) (accused must initiate conversation). The rule in *Edwards* applies even more forcefully in a case such as this where the subsequent interrogation is prompted by, and designed to explain, information which has come to the police as a direct result of an earlier *Miranda* violation.

statement."), *cert. denied*, 479 U.S. 1056, 107 S.Ct. 932, 93 L.Ed.2d 983 (1987); *United States v. Fouche*, 776 F.2d 1398, 1405 (9th Cir.1985) ("might want to talk to a lawyer"), *cert. denied*, 486 U.S. 1017, 108 S.Ct. 1756, 100 L.Ed.2d 218 (1988); *United States v. Prestigiacomo*, 504 F.Supp. 681, 683 (E.D.N.Y.1981) (mem.) ("maybe it would be good to have a lawyer"); *Cheatham v. State*, 719 P.2d 612, 618 (Wyo.1986) (after being asked if he wanted to talk, defendant responded "Well I don't care, I'd like to see a lawyer, too you know"); *Hampel v. State*, 706 P.2d 1173, 1176 (Alaska Ct.App.1985) ("I've got one question ... [and the question is concerning a lawyer] ... how would I be able to get one, a lawyer?"); *People v. Russo*, 148 Cal.App.3d 1172, 196 Cal.Rptr. 466, 468 (1983) ("I don't know if I should have a lawyer here or what."); *State v. Moulds*, 105 Idaho 880, 673 P.2d 1074, 1083 (Ct.App.1983) ("Maybe I need an attorney"); *State v. Smith*, 34 Wash.App. 405, 661 P.2d 1001, 1003 (1983) ("Do you think I need an attorney?"). *See also United States v. Porter*, 764 F.2d 1, 6 (1st Cir.1985) (unsuccessful call to attorney's office in presence of officer treated as equivocal request for counsel), *cert. denied*, 481 U.S. 1048, 107 S.Ct. 2178, 95 L.Ed.2d 835 (1987); *People v. Quirk*, 129 Cal.App.3d 618, 181 Cal.Rptr. 301, 308 (1982) (inquiry by defendant as to whether wife had hired an attorney treated as equivocal request for counsel). We hold that defendant's statement in this case was of a caliber similar to those just quoted, and like them, constituted an equivocal request for counsel.[15] *See also* Comment, *Equivocal Requests for Counsel: A Balance of Competing Policy Considerations*, 55 Cinc.L.Rev. 767, 770–71 (1987) [hereinafter "The Cincinnati Comment"] (categorizing recurring types of equivocal requests for counsel, including as one category "[i]ndecisive statements that indicate uncertainty in the suspect's mind about the need or advisability of obtaining legal representation").

Courts have developed different standards to handle equivocal requests for counsel. The United States Supreme Court identified three methods for handling equivocal requests in *Smith v. Illinois*, 469 U.S. 91, 95–96 & n. 3, 105 S.Ct. 490, 492–93 & n. 3, 83 L.Ed.2d 488 (1984), but declined to identify any of them as the constitutionally correct one.

> Some courts have held that all questioning must cease upon any request for or reference to counsel, however equivocal or ambiguous.... Others have attempted to define a threshold standard of clarity for such requests, and have held that requests falling below this threshold do not trigger the right to counsel.... Still others have adopted a third approach, holding that when an accused makes an equivocal statement that "arguably" can be construed as a request for counsel, all *interrogation must immediately cease except for narrow questions designed to "clarify" the earlier statement and the accused's desires respecting counsel.*

Id. at 96 n. 3, 105 S.Ct. at 493 n. 3 (emphasis added). In *Griffin*, this court adopted the third approach, holding "that when an accused makes an arguably equivocal request for counsel during custodial interrogation, further questioning must be limited to clarifying the request." 754 P.2d at 969. We remain convinced that this middle approach[16] is preferable to either of the two more extreme positions and note that it is regarded as the majority view. Note, *Judicial Approaches to the Ambiguous Request for Counsel*, 62 Notre Dame L.Rev. 460, 472 (1987) [hereinafter "The Notre Dame Note"]. It is also favored by commentators as the approach which best balances the interests of law enforcement and the rights of the accused. *See, e.g.*, Note, *Interrogation: Equivocal References to an Attorney*, 39 Vand.L.Rev. 1159 (1986) [hereinafter "The Vanderbilt Note"].

15. "Equivocal request" appears to be an imprecise term in this context. Many of the references to attorneys which are held to be equivocal requests for counsel are not requests at all. It may be preferable to refer to such statements as "equivocal references to an attorney." *See, e.g.*, Note, *The Right to Counsel During Custodial*

16. *See* The Vanderbilt Note at 1187 (clarification approach represents "a middle position").

The Right to Counsel During Custodial Interrogation: Equivocal References to an Attorney, 39 Vand.L.Rev. 1159, 1187–94 (1986); The Notre Dame Note at 472–73; The Cincinnati Comment at 783.

Unfortunately, neither Sgt. Elliot nor Sheriff Hayward attempted to clarify defendant's equivocal reference to an attorney. The transcript of the polygraph examination—and the actual tape is not part of our record—indicates a pause following defendant's equivocal statements about counsel after which Sgt. Elliot stated "Okay, if you are not worried about anything I would say that is fine, let's go ahead and proceed." Nothing in this statement by Sgt. Elliot nor any subsequent statement amounts to an effort to clarify defendant's request. Although, as indicated previously, the state did not see fit to brief the "equivocal request for counsel" issues on appeal, it argued below that defendant's subsequent statement that he was "willing to get it over with" was sufficient to clarify his position and to demonstrate a waiver of his right to counsel.[17] We disagree.

This case is similar to *United States v. Prestigiacomo*, 504 F.Supp. 681 (E.D.N.Y. 1981) (mem.), and *State v. Moulds*, 105 Idaho 880, 673 P.2d 1074 (Ct.App.1983), which were favorably cited by this court in *Griffin*. In *Prestigiacomo*, the interrogator did not clarify the defendant's equivocal request for counsel. 504 F.Supp. at 682. Instead, he asked defendant whether he would continue to answer questions. *Id.* After receiving an affirmative response, he proceeded to interrogate him. *Id.* The court in that case found the interrogator had given "the impression that what defendant said would not be treated as a sign, albeit an equivocal one, that he wished a lawyer." *Id.* at 684. That tactic was improper and, consequently, the court suppressed the statements which resulted from further interrogation. *Id.*

In *Moulds*, the defendant made an equivocal request for counsel. 673 P.2d at 1083. Instead of clarifying the request, the interrogator recognized defendant's right, informed defendant that the decision was his to make, and then proceeded to discuss the case with defendant. *Id.* Thereafter, the defendant made incriminating remarks. *Id.* The Idaho court found that defendant's "statements were the products of interrogation continued at the instance of the police after the right to counsel had been invoked." *Id.*, 673 P.2d at 1085. Consequently, the court affirmed the suppression of the statements. *Id.*

17. The state also argued below that defendant's signing the written waiver form, on the heels of his "willing to get it over with" comment, clarified that his position was to waive his right to counsel. At least one court has accepted this argument. *See State v. Smith*, 34 Wash.App. 405, 661 P.2d 1001, 1003 (1983). In *Smith*, the defendant signed a waiver form subsequent to his equivocal reference to counsel and then proceeded to speak with the officers. Our Washington counterpart found those facts sufficient to demonstrate a waiver on the part of the defendant.

We decline to adopt the Washington position for three reasons. First, we find the position inconsistent with the presumption against waiver. *See State v. Fulton*, 742 P.2d 1208, 1211 (Utah 1987). Second, we have already noted that once a defendant invokes his right to counsel, statements made in subsequent interrogations, without counsel present and even if pursuant to renewed warnings, must also be suppressed unless defendant initiates the contact. *See* note 14, *supra*. If police cannot circumvent the rule through renewed *Miranda* warnings days after a request for counsel, we see no reason to allow them to do so through a simple waiver form given on the heels of the equivocal reference without any clarification. Finally, other courts have not found a waiver where the defendant has signed a waiver form immediately after an unclarified, equivocal reference to counsel. *See, e.g., United States v. Prestigiacomo*, 504 F.Supp. 681, 682–84 (E.D.N.Y.1981) (mem.). *Cf. United States v. Fouche*, 776 F.2d 1398, 1405 (9th Cir.1985) ("[T]he police may not use a statement a suspect makes after an equivocal request for counsel, but before the request is clarified, as an effective waiver of the right to counsel."). Especially in this case, that approach makes sense. Once defendant made an equivocal reference to counsel, as explained in the text Sgt. Elliot could properly do only *one thing*—seek clarification. Instead, he concluded that defendant was "not worried," that they should "proceed ... and get it over with....." and he submitted the written form to defendant for signature. In effect, submission of the written form to defendant was an integral part of Sgt. Elliot's conduct which was at odds with his duty to clarify and as such, the written form cannot be taken as clarifying defendant's equivocal request.

The fatal flaw in both *Prestigiacomo* and *Moulds* was the failure to cease interrogation except for the very limited purpose of clarifying whether defendant wished to assert his right to counsel. The fact that defendant continued to answer questions was not a sufficient indication that he was abandoning his right to counsel. In contrast, *Griffin* serves as an example of a valid waiver of *Miranda* rights following clarification of an ambiguous reference to counsel. In *Griffin*, defendant was advised of his *Miranda* rights, which he waived. 754 P.2d at 966. However, during the ensuing interview there came a time when he said, "I'm calling an attorney." *Id.* The interrogating officer immediately asked, "OK, are you saying you don't want to talk anymore?" [18] *Id.* at 966–67. Defendant's response indicated he would continue to talk to the detective at that time, but planned to talk to an attorney later. *Id.* at 967. Thus, although the conviction in *Griffin* was reversed on other grounds, further interrogation following the clarifying exchange just described was held not violative of defendant's *Miranda* rights.

Defendant's statement in this case included a reference to an attorney which is properly classed as an equivocal request for counsel. Because Sgt. Elliot's warnings were the only *Miranda* warnings which defendant received before undergoing custodial interrogation, it was necessary that someone clarify that equivocal request before defendant could be subjected to custodial interrogation. Defendant's request was never clarified and, consequently, the state failed to demonstrate a valid waiver of defendant's right to counsel. The trial court erred in holding to the contrary. We accordingly reverse and remand for a new trial.

Because the trial court concluded that defendant's *Miranda* rights had not been violated, the parties did not have occasion to argue which evidence had to be excluded and whether any exceptions to the exclusionary rule might apply.[19] On remand,

18. The main problem inherent in the clarification approach is "the additional opportunity given to law enforcement officials to ... [use] clarifying questions to dissuade" suspects from asserting their right to counsel. The Notre Dame Note at 472. *See Anderson v. Smith*, 751 F.2d 96, 104 n. 9 (2nd Cir.1984); *Daniel v. State*, 644 P.2d 172, 177 (Wyo.1982) (permissible for officer to "seek clarification of the suspect's desires, as long as he does not disguise the clarification as a subterfuge for coercion or intimidation"). *See also Thompson v. Wainwright*, 601 F.2d 768, 771–72 (5th Cir.1979) (during purported effort to clarify, officer asserted that obtaining counsel may not be in defendant's best interest); *Hampel v. State*, 706 P.2d 1173, 1182 (Alaska Ct.App.1985) (during purported effort to clarify, officer emphasized delay and complexity of obtaining an attorney).

One commentator has suggested that only one question should be permitted to seek clarification. With our embellishment in the form of an introductory statement, that question is as follows: You have been advised of your rights, including the right to have an attorney with you during this interview even if you cannot afford to hire one. What you just said leads me to wonder whether or not you wish to avail yourself of that right. "Do you want the assistance of [an attorney] at this time or do you agree to answer questions without the presence of [an attorney]?" Comment, *Equivocal Requests for Counsel: A Balance of Competing Policy Considerations*, 55 Cinc.L.Rev. 767, 782 (1987).

19. The "independent source doctrine" and "inevitable discovery rule" are among the exceptions to the exclusionary rule. *See State v. Northrup*, 756 P.2d 1288, 1292–94 (Utah Ct.App.1988). The state had no occasion to argue either exception, on appeal or below. Consequently, we are unable to determine whether either of these exceptions might apply in this case to some of the evidence which might otherwise have to be suppressed.

"The independent source doctrine allows admission of evidence that has been discovered by means wholly independent of any constitutional violation." *Nix v. Williams*, 467 U.S. 431, 443, 104 S.Ct. 2501, 2508, 81 L.Ed.2d 377 (1984). Thus, any evidence which was discovered apart from defendant's statements made during custodial interrogation need not be excluded.

The inevitable discovery rule allows the admission of evidence as long as "the prosecution can establish by a preponderance of the evidence that the information ultimately or inevitably would have been discovered by lawful means." *Id.* at 444, 104 S.Ct. at 2509. *See, e.g., People v. Freeman*, 739 P.2d 856, 860 (Colo.Ct.App.1987) (body of deceased victim was so conspicuously located that discovery was inevitable); *State v. Miller*, 300 Or. 203, 709 P.2d 225, 242–43 (1985) (hotel maid would inevitably have discovered body of deceased victim within 56 hours of actual discovery and reported discovery to police), *cert. denied*, 475 U.S. 1141, 106 S.Ct. 1793, 90 L.Ed.2d 339 (1986). Under this rule, the prosecution must show that the evidence "would" have been discovered, not

the parties must of course be allowed to argue these various points. After entertaining these arguments, the trial court must exclude all primary evidence elicited during the custodial interrogation and all incriminating evidence derived therefrom which is not saved by an exception to the exclusionary rule. *Miranda v. Arizona*, 384 U.S. 436, 479, 86 S.Ct. 1602, 1630, 16 L.Ed.2d 694 (1966); *Nix v. Williams*, 467 U.S. 431, 441, 104 S.Ct. 2501, 2507, 81 L.Ed.2d 377 (1984).

Our decision is a difficult one and will be a source of consternation to many, who will question why the state should be put to the cost and burden of having to retry someone who clearly is guilty. But while the results in particular cases may be unwelcome, "[t]he fifth amendment exclusionary rule is clearly dictated by the Constitution and is the only possible means of protecting the values underlying the privilege against self-incrimination." M. Gardner, *The Emerging Good Faith Exception to the Miranda Rule—A Critique*, 35 Hastings L.J. 429, 466 (1984). We accordingly reverse and remand for proceedings consistent with this opinion.

BILLINGS and GREENWOOD, JJ., concur.

ON PETITION FOR REHEARING

"New" Matter

In its first brief and oral argument before this court, the state, as to the range of *Miranda* issues, made a deliberate tactical decision to rely solely on the theory that defendant was not subjected to "custodial interrogation" at the time of the polygraph examination, *supra* at 1108, an issue which has now been resolved in defendant's favor. *See id.* In our initial opinion we regarded this approach by the state as "stop[ping] short of conceding" defendant's arguments concerning his equivocal request for counsel. *Id.* In its petition for rehearing, the state now argues for the first time that defendant's response to subsequent *Miranda* warnings [20] adequately served to clarify defendant's equivocal request for counsel or, perhaps more accurately, obviated any need to clarify the request.

While the state's decision not to develop this issue at trial is understandable in light of the state's success there on the argument that defendant had not even equivocally invoked his right to counsel when first given *Miranda* warnings, *see supra* at 1108, the state should have raised the argument in initial briefing on appeal if it believed this fall-back position had merit. Given the posture of the trial court proceedings, this would not have run afoul of our proscription against raising arguments for the first time on appeal. But in such a situation, consistent with our standing aversion to considering for the first time at some later stage issues that could have been raised at an earlier stage, we ordinarily will not consider arguments presented for the first time on petition for rehearing, and are especially loathe to revisit a decision once rendered when the party seeking reconsideration intentionally did not present us with particular arguments in more timely fashion. *See State v. Marshall*, 791 P.2d 880, 885–87 (Utah Ct.App.), *cert. denied*, 800 P.2d 1105 (Utah 1990).

However, we are not unsympathetic to the sheer volume and complexity of issues presented in this case, some ten having been raised by appellant, even though we found it necessary to reach only two in our initial opinion. *See supra*, at 1103. Even without addressing the issues of whether, assuming custodial interrogation, defendant equivocally invoked his right to counsel and, if he did, whether the subsequent

simply that it "could" or "might" have been discovered. *Miller*, 709 P.2d at 242. *See also United States v. Romero*, 692 F.2d 699, 704 (10th Cir.1982). It is altogether unclear from the record before us how much, if any, of the evidence discovered as a result of the improper custodial interrogation would inevitably have been discovered.

20. In view of the state's prior position, we made only minimal reference to the subsequent warnings in our initial opinion, noting that "the state does not argue the second set of *Miranda* warnings are of any consequence to our analysis." *Supra* at 1108 n. 14.

warnings cured the problem, the state's initial brief ran well over our page limit for briefs.

Considering the state's burden when confronted with multiple issues of the magnitude presented here, in conjunction with the significance of the waiver issue, and in light of helpful authority from the United States Supreme Court which was not available at the time of initial argument, we grant the state's petition for rehearing and proceed to treat its claim that the subsequent *Miranda* warnings and defendant's response thereto served to clarify his prior equivocal request for counsel or at least rendered it inconsequential as to the incriminating statements he made after getting new *Miranda* warnings.[21]

Subsequent Miranda Warnings As Clarifying Equivocal Request

[5] The state concedes for purposes of our further review that Sergeant Elliot erred in failing to follow firmly established precedent by not clarifying defendant's equivocal reference to counsel when defendant was first given the *Miranda* warnings. However, the state argues that a subsequent set of warnings, subsequent waiver by defendant, and information gleaned from the subsequent interrogation purged the taint of illegality introduced by the earlier disregard of defendant's equivocal request for counsel. The state calls our attention to *Oregon v. Elstad*, 470 U.S. 298, 105 S.Ct. 1285, 84 L.Ed.2d 222 (1985), and claims we improperly relied on *Edwards v. Arizona*, 451 U.S. 477, 101 S.Ct. 1880, 68 L.Ed.2d 378 (1981). *See Sampson*, at 1108 n. 14. The state focuses particularly on an ambiguous footnote in *Edwards*. *See* 451 U.S. at 486 n. 9, 101 S.Ct. at 1885 n. 9.

In *Elstad*, the United States Supreme Court held that a defendant's subsequent statement, given after an initial statement made without the benefit of *Miranda* warnings, may be admissible when *Miranda* warnings preceded the subsequent statement and there were no improper or coercive tactics employed by police in connection with the initial statement. *Elstad*, 470 U.S. at 314, 105 S.Ct. at 1296. The Court's rationale was that *Miranda*'s protective measures, not the Fifth Amendment itself, were violated in such a case, making suppression of the later statements unnecessary. *Elstad*, 470 U.S. at 308, 105 S.Ct. at 1292.

On the other hand, in *Edwards* the Court emphasized that, unless an accused initiates the encounter, police cannot re-administer *Miranda* warnings and renew interrogation once a defendant has "clearly asserted" his or her right to counsel on an earlier occasion when *Miranda* warnings were actually given. *Edwards*, 451 U.S. at 484–85, 101 S.Ct. at 1884–85.

The state invites us to focus total attention on the "clearly asserted" language in *Edwards*, and hold that *Edwards* is accordingly inapplicable. The state would have us instead employ the *Elstad* rationale, because defendant did not *clearly* assert his right to counsel in this case, and determine whether the Fifth Amendment itself was violated. In essence, the state asserts we must find that defendant effectively waived his right to counsel when he was given new *Miranda* warnings and said nothing about counsel since the failure to clarify the equivocal request for counsel was "only" a violation of the *Miranda* doctrine, not a violation of the Fifth Amendment.

We recognize that waiver of constitutional rights is "possible ... when the request for counsel is equivocal." *Edwards*, 451 U.S. at 486 n. 9, 101 S.Ct. at 1886 n. 9. But we are hard-pressed to see how an equivocal request for counsel can be meaningfully waived in advance of its having ever been clarified.

"The merit of the *Edwards* decision lies in the clarity of its command and the certainty of its application." *Minnick v. Mis-*

21. We note that these circumstances are unique and hasten to caution that the complexity of issues, the length of briefs, or a tactical choice to initially avoid issues on appeal will normally not suffice to induce us to consider issues raised for the first time on a request to reconsider a decision already made.

sissippi, — U.S. —, 111 S.Ct. 486, 490, 112 L.Ed.2d 489 (1990). A defendant who requests counsel "is not subject to further interrogation by the [police] until counsel has been made available to him...." *Edwards*, 451 U.S. at 485, 101 S.Ct. at 1885. The *Edwards* decision leaves no room for ambiguity or uncertainty in the context of a clear invocation of the right to counsel. The singular event which may occur upon a defendant's request for counsel is for the defendant to consult with counsel.[22] Neither the passage of time, however great, nor the administration of additional *Miranda* warnings will allow officers to begin interrogation anew unless the suspect has been given the chance to consult with an attorney.

Obviously, the instant case does not fit squarely into either the *Elstad* or the *Edwards* framework. Unlike in *Elstad*, *Miranda* warnings were given to Sampson at the outset; unlike in *Edwards*, Sampson's request for counsel was not unequivocal. But we think the equivocal request for counsel situation is conceptually and practically more analogous to a clear request for counsel, as in *Edwards* and *Minnick*, than it is to a wholly unwarned statement as in *Elstad*. By analogy to the point made in the preceding paragraph regarding a clear request for counsel, it would appear that the singular event which may occur upon a defendant's equivocal reference to counsel is for defendant's "request" to be clarified. *See supra*, at 1110 n. 17 ("Once defendant made an equivocal reference to counsel ... Sgt. Elliot could properly do only *one thing*—seek clarification."). Neither the passage of time, however great, nor the administration of additional *Miranda* warnings will allow officers to reconvene interrogation absent clarification. If a signed waiver executed immediately after the equivocal request for counsel will not be taken as adequate clarification, *see id.*, 1110, there is no reason why a waiver later in time should be recognized as such. Simply put, we believe that an equivocal request for counsel must be treated by the police and analyzed by the courts as though it were an unambiguous request for counsel—until such time as it has been properly clarified and shown to be otherwise.[23]

Violation Of Miranda vs. Violation Of Fifth Amendment

[6] The state urges that the subsequent confession and derivative evidence were properly admitted under *Elstad*, claiming the failure to clarify defendant's equivocal request for counsel, although a violation of *Miranda*, was not violative of the Fifth Amendment itself. In advancing its *Elstad* argument, the state principally relies on *Martin v. Wainwright*, 770 F.2d 918 (11th Cir.1985), *cert. denied*, 479 U.S. 909, 107 S.Ct. 307, 93 L.Ed.2d 281 (1986).[24] In *Mar-*

22. The *Edwards* Court did not foreclose the possibility of waiver of the right to counsel when a defendant, once having invoked the right, freely initiates further conversation with officers even though the defendant has not consulted counsel. *See* 451 U.S. at 484–85, 101 S.Ct. at 1884–85. *See also United States v. De La Luz Gallegos*, 738 F.2d 378, 381 (10th Cir.) (where attorney is requested but not yet provided, *Edwards* does not preclude introduction of voluntary statements not made as a result of police questioning), *cert. denied*, 469 U.S. 1076, 105 S.Ct. 574, 83 L.Ed.2d 514 (1984).

23. The concern which explains our view is, in large part, this: In the course of properly clarifying an equivocal request, the sanctity of an accused's right to counsel will be brought home for the accused. *See supra* at 1110. If instead an equivocal request is ignored, and the timid or ignorant suspect's halting effort to explore the advisability of seeking counsel is apparently for naught, the suspect may perceive he is being discouraged from availing himself of the right to counsel. Someone in defendant's shoes who simply gets a new set of *Miranda* warnings with no acknowledgement of his prior reference to counsel may think: "I wondered before if I should have a lawyer. My question was ignored. There's no sense in raising it again."

24. The state has cited other cases to similar effect in its petition and at oral argument. *E.g.*, *United States v. Gonzalez–Sandoval*, 894 F.2d 1043 (9th Cir.1990); *United States v. Barte*, 868 F.2d 773 (5th Cir.), *cert. denied*, — U.S. —, 110 S.Ct. 547, 107 L.Ed.2d 543 (1989); *Elledge v. Dugger*, 823 F.2d 1439 (11th Cir.1987); *United States v. Patterson*, 812 F.2d 1188 (9th Cir.1987), *cert. denied*, 485 U.S. 922, 108 S.Ct. 1093, 99 L.Ed.2d 255 (1988); *Thompson v. Wainwright*, 601 F.2d 768 (5th Cir.1979); *United States ex rel. Hudson v. Cannon*, 529 F.2d 890 (7th Cir.1976). Even if they were otherwise persuasive, the

tin, the suspect was given his *Miranda* warnings. In the course of interrogation, he asked: "Can't we wait until tomorrow?" *Martin*, 770 F.2d at 922–23. The Eleventh Circuit held this question was an equivocal request to *terminate questioning and to invoke the right to remain silent*, at least temporarily. It is notable that the court did not find the question to be an equivocal request for counsel, although it determined that an equivocal request to terminate questioning should be treated analogously to an equivocal request for counsel. *Martin*, 770 F.2d at 924.

The court held that the defendant's first confession, given subsequent to his equivocal request to remain silent which was not honored, was inadmissible as violative of *Miranda*. *Martin*, 770 F.2d at 924. The court stated that the failure to terminate questioning pending clarification, like the failure to give *Miranda* warnings in the *Elstad* context, violates the technical requirements of the *Miranda* rule although it does not violate the Fifth Amendment. *Id.* at 928–29. But because the first confession was not coerced, the court upheld admission of a second confession, given several days later and on the heels of renewed *Miranda* warnings, and after the defendant had consulted with counsel. *Id.* at 929.

The state asks us to treat the failure to clarify defendant's equivocal request for counsel in this case in similar fashion to *Martin* and to determine that it was merely a technical violation of the *Miranda* rule, and therefore does not bar introduction of defendant's subsequent confession made after new *Miranda* warnings were given. In urging this analogy, the state slights the continued vitality and invigoration given *Edwards v. Arizona* in subsequent Supreme Court decisions, including the recent decisions in *Minnick v. Mississippi*, — U.S. —, 111 S.Ct. 486, 112 L.Ed.2d 489 (1990) and *Arizona v. Roberson*, 486 U.S. 675, 108 S.Ct. 2093, 100 L.Ed.2d 704 (1988). Moreover, such an analysis is inapposite given our determination that an equivocal reference to counsel should be, until properly clarified, treated on equal footing with an unambiguous request to speak to an attorney.[25]

A rigid insistence on clarification of the equivocal request for counsel if interrogation is to continue requires just that—clarification. *State v. Griffin*, 754 P.2d 965, 969 (Utah Ct.App.1988). An equivocal request is simply not clarified by being ignored by the police. Clarification necessarily implies that the equivocal request must be acknowledged by the interrogator. The interrogator must ask something like: "Your response suggests that you may

cases cited by the state are readily distinguishable in that no case involves two sets of *Miranda* warnings—the first followed by an equivocal request for counsel and the second followed by apparent waiver—as is the case before us. The cases, with the exception of *Martin* which we treat more fully in the text, instead involve some variation on the *Elstad* theme—statements made without *Miranda* warnings, followed by *Miranda* warnings, waiver, and further statements.

The state additionally cites, in a letter submitted after argument on the petition for rehearing, *State v. Christofferson*, 793 P.2d 944 (Utah Ct.App.1990), claiming that this court there "held that [a] second set [of warnings] served as a clarification of the equivocal request." We do not read *Christofferson* this way. The police officers in *Christofferson* apparently ceased questioning after the equivocal request for counsel, and proceeded to clarify the defendant's equivocal request. Once they did so and learned that the defendant did not desire counsel, the officers continued interrogation. *Id.* at 947. We hesitate to read the decision as equating a mere second administration of *Miranda* warnings, even if no *Miranda* rights were then invoked, with definitive clarification of an equivocal request for counsel. Such an important and far-reaching conclusion would surely have been accompanied by lengthy discussion and analysis, which is not to be found in the opinion, and is at odds with language in the opinion noting that clarifying questions were asked prior to proceeding with a second set of warnings and further interrogation. *See id.*

25. The state's proffered analysis is further flawed in that the bright-line rule of *Edwards*, cited in *Minnick v. Mississippi* for "clarity of its command" and "certainty of its application," 111 S.Ct. at 490, would be undermined if courts were required to receive evidence pertaining to the lack of coercion attending an equivocal request for counsel. In addition to breeding contempt for a cherished constitutional right, significant judicial resources would be needlessly expended, a result clearly eschewed in *Edwards* and its progeny.

wish to consult with an attorney before answering any of my questions. Do you wish to speak with an attorney or do you wish to answer my questions now?" *Sampson*, at 1109.

For all practical purposes, as we have held above, until such time as the equivocal reference to counsel is clarified as not being an actual request for counsel, it must be treated the same as an express and unambiguous request for counsel. *Cf. Griffin*, 754 P.2d at 969. ("[W]hen an accused makes an arguably equivocal request for counsel during custodial interrogation, further questioning must be limited to clarifying the request.") The question then becomes whether the Constitution, or only *Miranda*, is violated if police disregard an invocation of the right to counsel and obtain a confession.

The answer is clear. *Edwards* and its progeny teach that once the right to counsel has been invoked "subsequent incriminating statements made without [the defendant's] attorney present [violate] the rights secured to the defendant by the *Fifth and Fourteenth Amendments to the United States Constitution.*" [26] *Oregon v. Bradshaw*, 462 U.S. 1039, 1043, 103 S.Ct. 2830, 2833, 77 L.Ed.2d 405 (1983) (emphasis added); *See Shea v. Louisiana*, 470 U.S. 51, 52, 105 S.Ct. 1065, 1066, 84 L.Ed.2d 38 (1985) (interrogation subsequent to a request for counsel violates Fifth and Fourteenth Amendments). *See also Minnick*, 111 S.Ct. at 489 (valid waiver cannot be established by showing that defendant responded to further questions).

In *Roberson*, the Court stated: "Surely there is nothing ambiguous about the requirement that after a person in custody has expressed his desire [for] counsel, he 'is not subject to further interrogation ... until counsel has been made available to him....'" 486 U.S. at 682, 108 S.Ct. at 2098 (quoting *Edwards*, 451 U.S. at 484–85, 101 S.Ct. at 1885). Given our view that an equivocal request must be treated like a clear request pending clarification, failure to clarify an equivocal request, and interrogation conducted after that request, clearly do not fall within the rubric of a "mere technical violation" as suggested by the state.

The United States Supreme Court has demonstrated no crypticism or ambivalence in holding violations of the right to counsel during interrogation to be constitutional in nature. *See Minnick*, 111 S.Ct. at 491 ("Whatever the ambiguities of our earlier cases on this point, we now hold that when counsel is requested, interrogation must cease, and officials may not reinitiate interrogation without counsel present...."); *Roberson*, 486 U.S. at 683, 108 S.Ct. at 2098–99 (emphasizing distinction between exercise of right to terminate interrogation and remain silent and right to counsel).

We therefore decline to adopt a rule which would relegate failure to clarify an equivocal request for counsel to the status of "mere" *Miranda* violation for *Elstad* purposes.[27]

26. Insofar as *Martin's* view of an analogy between an equivocal invocation of the right to remain silent and an equivocal request for counsel might suggest otherwise, we reject that view. *Cf. Roberson*, 486 U.S. at 683, 108 S.Ct. at 2099 (emphasizing distinction between exercise of right to terminate interrogation and remain silent and right to counsel).

27. The state also argues that even if defendant's statements must be suppressed, the derivative physical evidence, chiefly the victim's body, would be properly admitted, presumably by way of photographs and descriptive testimony. The state proceeds upon the assumption that the interrogation subsequent to defendant's equivocal reference to counsel, concededly a violation of the *Miranda* rule, was merely technically defective, not constitutionally infirm. The state calls our attention to several decisions in which other courts have allowed the admission of derivative evidence obtained subsequent to interrogation conducted in violation of the technical rules of *Miranda*. *See, e.g., United States v. Patterson*, 812 F.2d 1188 (9th Cir.1987), *cert. denied*, 485 U.S. 922, 108 S.Ct. 1093, 99 L.Ed.2d 255 (1988); *In re Owen F.*, 70 Md.App. 678, 523 A.2d 627, *cert. denied*, 310 Md. 275, 528 A.2d 1286 (1987); *State v. Wethered*, 110 Wash.2d 466, 755 P.2d 797 (1988). We find the cases cited by the state to be inapplicable, as each addresses violations of the *Miranda* rule which are not deemed constitutional in dimension. We have already held in evaluating the state's *Elstad* argument that the violation of defendant's right to counsel was of constitutional dimension and not merely a violation of *Miranda*.

CONCLUSION

The subsequent *Miranda* warnings given to defendant did not serve to clarify his prior equivocal request for counsel or somehow make that request go away. The violation was constitutional in magnitude. Accordingly, testimonial and physical evidence derived from all ensuing interrogation must be suppressed.

Having reheard and reconsidered the matter, our initial opinion stands as supplemented herein.

GATE CITY FEDERAL SAVINGS AND LOAN ASSOCIATION, Plaintiff and Appellant,

v.

Edward A. DALTON, Jr., John C. Forrester, Jr., Michael C. Johnson, and Daniel W. Marcum, et al., Defendants and Appellees.

No. 890498-CA.

Court of Appeals of Utah.

March 26, 1991.

Lender brought action against borrowers following default on trust deeds and notes. The District Court, Summit County, J. Dennis Frederick, J., entered summary judgment in favor of borrowers, and lender appealed. The Court of Appeals, Garff, J., held that: (1) under trust deed provision setting forth requirements to release borrowers from their obligations on note, indemnity agreement executed by lender satisfied requirements that written assumption be executed by borrowers' successor in interest and be accepted in writing by lender, and (2) lender waived its option to accelerate borrowers' obligations under trust deeds and note by consenting to borrowers' transfer of property in indemnity agreement, in which it acknowledged assumption of mortgages.

Affirmed.

1. Appeal and Error ⇐934(1)

In determining whether lower court correctly found that there was no genuine issue of material fact in ruling on summary judgment motion, Court of Appeals views facts and inferences to be drawn therefrom in light most favorable to losing party. Rules Civ.Proc., Rule 56(c).

2. Appeal and Error ⇐842(1)

Court of Appeals reviews trial court's decision on legal questions for correctness.

3. Indemnity ⇐9(1)

Under trust deed provision setting forth requirements for release of borrowers from their obligations on note, indemnity agreement executed by lender satisfied requirements that written assumption be executed by borrowers' successor in interest and be accepted in writing by lender; under indemnity agreement, borrowers' successor in interest agreed not only to indemnify lender for any mechanics liens on property, but also to assume individual mortgages.

Evidence obtained in violation of the Fifth Amendment is properly suppressed under the fruit of the poisonous tree doctrine. *Supra* at 1111. *See, e.g., Shea v. Louisiana*, 470 U.S. 51, 52, 105 S.Ct. 1065, 1066, 84 L.Ed.2d 38 (1985) (interrogation subsequent to request for counsel violates Fifth Amendment). *See also Nix v. Williams*, 467 U.S. 431, 442 & n. 3, 104 S.Ct. 2501, 2508 & n. 3, 81 L.Ed.2d 377 (1984). While we are not ignorant of the obstacles which the state will face in presenting a case on remand without evidence of the body absent the applicability of some exception to the exclusionary rule, *see supra* at 1111 & n. 19, the derivative evidence of the child's body was obtained as a direct result of interrogation that was improper as a matter of constitutional law, and must, absent some exception, be suppressed. We are not enthusiastic about the obstacles our decision will create to securing defendant's conviction on retrial. But we are unwilling to sidestep important constitutional safeguards to assuage the frustrations that inhere in retrying a defendant clearly guilty of such a heinous crime. *See Nix v. Williams*, 467 U.S. at 442, 104 S.Ct. at 2508.

APPENDIX B

IN THE SUPREME COURT

STATE OF UTAH

332 STATE CAPITOL

SALT LAKE CITY, UTAH 84114

August 23, 1991

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State of Utah,
Plaintiff and Petitioner,
v.
Carlos R. Sampson,
Defendant and Respondent.

No. 910234
890327-CA
CR87497

This day Petition for Writ of Certiorari having been heretofore considered, and the Court being sufficiently advised in the premises, it is ordered that the same be, and hereby is, denied.